Environmental Justice for Indigenous Hawaiians: Reclaiming Land and Resources

Melody Kapilialoha MacKenzie, Susan K. Serrano, and Koalani Laura Kaulukukui

Hānau ka 'āina, hānau ke ali'i, hānau ke kanaka. Born was the land, born were the chiefs, born were the common people. Mary Kawena Pukui, *Ōlelo No'eau, Hawaiian Proverbs & Poetical Sayings* 56 (1983). So begins an ancient proverb that describes the inseparable spiritual—and genealogical—connection between Native Hawaiians and their land and environment. For Native Hawaiians, the land, or *'āina*, is not a mere physical reality. Instead, it is an integral component of Native Hawaiian social, cultural, and spiritual life. Like many indigenous peoples, Native Hawaiians see an interdependent, reciprocal relationship between the gods, the land, and the people.

In stark contrast to the Western notion of privately held property, Hawaiians did not conceive of land as exclusive and alienable, but instead communal and shared. The land, like a cherished relative, cared for the Native Hawaiian people and, in return, the people cared for the land. The principle of *mālama 'āina* (to take care of the land) is therefore directly linked to conserving and protecting not only the land and its resources but also humankind and the spiritual world as well. *See* Lilikalā Kame'eleihiwa, *Native Land and Foreign Desires: Pehea Lā E Pono Ai?* (1992).

Western colonialism throughout the eighteenth and nineteenth centuries dramatically altered Hawaiians' relationship to the land. Hawaiian lands were divided, confiscated, sold away; Native Hawaiian cultural practices were barred and ways of life denigrated. In 1893, the independent and sovereign Hawaiian nation was illegally overthrown with direct U.S. military support. Large sugar plantations diverted water from Hawaiian communities. More Hawaiians were separated from the land, thereby severing cultural and spiritual connections. *See* Jonathan Kay Kamakawiwo'ole Osorio, *Dismembering Lāhui: A History of the Hawaiian Nation to 1887* (2002); Haunani-Kay Trask, *From a Native Daughter: Colonialism and Sovereignty in Hawai'i* (rev. ed. 1999).

Hawaiians in their homeland still bear the worst socioeconomic indicators of all of Hawai'i's people—the highest rates of illness, prison incarceration, and homelessness, and the lowest rates of higher education and family income.

But Native Hawaiians are again reclaiming their land. In partnership with conservation nonprofits and governmental bodies, Native Hawaiians are regaining control over the management of their land, environment, and cultural resources. Three recent land reclamations, described below, represent some the first-ever returns of lands to Native Hawaiian ownership and control in over a century. The 25,856-acre Wao Kele o Puna rainforest on the Big Island of Hawai'i was successfully returned to Native Hawaiian hands after a more than twenty-year legal and political battle sparked by a private entity's attempts to clear the native forest to drill for geothermal energy. Waimea Valley, a lush and culturally rich tract of land on the north shore of O'ahu—originally managed by high-ranking Hawaiian priests, later sold to private interests for an adventure park and threatened with subdivision into luxury home lots—has returned to Native Hawaiian ownership. Finally, and perhaps most well known, is the return of Kaho'olawe island to the protection and stewardship of the Native Hawaiian people after the ravages of deforestation, massive erosion, and nearly fifty years of U.S. military live-fire bombing. In each case, Hawaiian organizations and individuals are participating in the protection of natural and cultural resources and ensuring that Native Hawaiian traditions and customs will be practiced on those lands far into the future.

Through these three examples, this essay explores the current "environmental justice" model and posits a new type of Native Hawaiian "restorative environmental justice" that takes into account the unique experiences of indigenous Hawaiians. The traditional environmental justice model typically focuses on the siting of hazardous facilities near communities of color and the poor. This traditional model often furthers environmental justice by providing communities of color and indigenous communities the tools they need to advocate effectively for the siting and health outcomes they seek. *See* Eric K. Yamamoto & Jen-L W. Lyman, *Racializing Environmental Justice*, 72 U. COLO. L. REV. 311, 320 (2001).

While effective, the framework often fails to comprehend complex issues of indigenous peoples' spiritual, social, and cultural connections to the land and natural environ-

Ms. MacKenzie is an assistant professor and director of the Center for Excellence in Native Hawaiian Law at the William S. Richardson School of Law, University of Hawai'i at Mānoa. She can be reached at mkmacken@hawaii.edu. Ms. Serrano is the director of Educational Development at the Center for Excellence in Native Hawaiian Law and can be reached at susanks@hawaii.edu. Ms. Kaulukukui is a 2006 graduate of the William S. Richardson School of Law.

ment. It also sometimes disregards the history of Western colonization and indigenous groups' ongoing attempts to achieve cultural and economic self-determination. For example, "while some might describe the siting of a waste disposal plan near an indigenous American community as environmental racism, that community might say that the wrong is not racial discrimination or unequal treatment; it is the denial of group sovereignty—the control over land and resources for the cultural and spiritual well-being of a people." Yamamoto & Lyman, at 312. For many indigenous peoples, environmental justice is thus largely about cultural and economic self-determination as well as about belief systems that connect their history, spirituality, and livelihood to the natural environment. *See* Robert A. Williams, Jr., *Large Binocular Telescopes, Red Squirrel Piñatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World*, 96 W. VA. L. REV. 1133 (1994); Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225 (1996).

The land and environmental controversies, discussed below, are partly about the imposition of disproportionate environmental burdens on Hawaiian communities—the bombing of Kaho'olawe, drilling in the Wao Kele o Puna forest, and commercial development in Waimea Valley—but they are also about something much more. For Hawaiians, restorative environmental justice is in large part about doing justice through reclamation and restoration of land and culture. A new environmental justice framework thus expands the focus beyond discrimination and ill health to integrate community history, political identity, and socioeconomic and cultural needs in defining environmental problems and fashioning remedies. *See* Yamamoto & Lyman, at 313.

These Hawaiian land reclamations are therefore types of restorative justice; not only are they attempts to preserve the fragile ecosystems of Hawai'i, they are efforts to restore to Native Hawaiians a measure of "sovereignty, economic self-sufficiency, and cultural restoration—an expansive, group-resonant type of environmental justice." Yamamoto & Lyman, at 355.

Wao Kele o Puna

In Wao Kele o Puna, a 25,856-acre native rain forest draped on the flanks of Kīlauea Volcano, three important elements converge—the spiritual and religious importance of the area to Native Hawaiians as the home of the Hawaiian fire goddess Pele; the traditional use of Wao Kele o Puna by generations of indigenous Hawaiians for subsistence, cultural, and religious purposes; and the designation of these lands in the 1848 Māhele—a process that converted the Hawaiian communal land system into a Western private-property system—as Hawaiian government lands. Following the illegal overthrow of the Hawaiian government in 1893 by U.S. military-backed American businessmen, government lands, including Wao Kele o Puna, were "ceded" to the United States in the 1898 Joint Resolution annexing Hawai'i. When Hawai'i became a state in 1959, the Admission Act provided that ceded lands, with some exceptions, were to be held by the new state as a public trust for five trust purposes, including "the betterment of conditions of native Hawaiians." *See* Section 5(f), Admission Act, Pub. L. No. 86-3, 73 Stat. 4.

Wao Kele o Puna is a descriptive term that means the rain belt of Puna—an area where clouds, attracted by the forests, accumulate. It is thought that Wao Kele o Puna may be an abbreviated form of Wao Oma'u o Kele o Puna, referring to Oma'u, one of Pele's aunts and a senior member of the Pele clan. *See Pele Defense Fund v. Estate of James Campbell*, Findings of Fact and Conclusions of Law, Civ. No. 89-089 (Haw. 3d Cir. 2002), at 5-6. In one part of Wao Kele, there were *mala'ai*, or dryland garden plots of land, used by Hawaiian families residing in the Kalapana district for subsistence and cultural activities. Early Hawaiians used Wao Kele's lands for planting *kukui*, ginger, *kalo*, *ti* leaf, and *awa*. There are at least two known large lava tube systems extending into Wao Kele. Both systems contain archaeological evidence of prehistoric and historic use of the tubes and surface lands for hunting, gathering, warfare, and burial purposes. *Id.*

Wao Kele is the last intact large native lowland rainforest in Hawai'i, providing essential habitat to more than 200 native plant and animal species, including threatened or endangered species. The forest also serves as a protected passageway for native birds traversing between the upland to the ocean. Wao Kele o Puna is also critical to water quality on Hawai'i island because it covers over 20 percent of the Pāhoa aquifer, the largest drinking water source on the island. *See Agreement Announced to Protect More Than 25,000 Acres of Rainforest on Hawaii Island*, OHA Press Release, September 12, 2005.

The legal controversy over Wao Kele o Puna began in the early 1980s when a large landowner, Campbell Estate, proposed to develop geothermal energy on a 25,000-acre parcel of forested conservation land known as Kahauale'a, located adjacent to Volcanoes National Park and upland from Wao Kele o Puna. The proposal resulted in community opposition and a series of contested case hearings, during which new lava flows overran the Kahauale'a area, making geothermal development untenable. The state, which supported geothermal development, proposed exchanging Campbell's Kahauale'a lands with the adjacent Wao Kele o Puna and part of the Puna Forest Reserve. *See Dedman v. Board of Land and Natural Resources*, 69 Haw. 255, 740 P.2d 28 (1987), *cert. denied*, 485 U.S. 1020 (1988). This was an astonishing proposition—Wao Kele o Puna was designated a Natural Area Reserve, a designation under state law for pristine areas supporting unique natural resources to be preserved in perpetuity. *See* HAW. REV. STAT. § 195-1, et. seq.

Moreover, Native Hawaiians, and in particular those who honor or are genealogically connected to Pele and her *'ohana* or extended family, believe that geothermal drilling desecrates Pele's body and takes her energy and lifeblood. In two additional contested case hearings, this time centered around designation of a portion of Wao Kele o Puna as a

geothermal resource subzone and Campbell's application for a conservation district use permit to allow actual drilling, individual Pele practitioners challenged the proposed drilling on First Amendment free exercise of religion grounds. On appeal, the Hawai'i Supreme Court, although acknowledging the sincerity of the religious claims at issue, determined that there was no burden on the exercise of religion. The court found controlling the absence of proof that religious ceremonies were held in the specific area proposed for development. *See Dedman*, 740 P.2d at 33.

The Pele Defense Fund, including Pele practitioners and Native Hawaiians living in *ahupua'a*—traditional land divisions running from the sea to the mountains—adjacent to Wao Kele o Puna, then brought suit in federal court challenging the land exchange between the state and Campbell Estate. The plaintiffs argued that the lands had been exchanged without any attempt to assess the impact on the trust purposes set forth in the Admission Act and that at least two of the trust purposes—the betterment of the conditions of Native Hawaiians and public use of the lands—were violated by the exchange. The plaintiffs also contended that because Section 5(f) of the Admission Act requires that the use of trust lands be consistent with the constitution and laws of the state, state laws protecting the lands must be read as part of the Section 5(f) trust. In this instance, state law had set aside the trust lands in a Natural Area Reserve, and Native Hawaiians used the lands for traditional access, gathering, and religious practices protected under the state Constitution. *See* HAW. CONST. art. XII, § 7. Ultimately, the case was dismissed on the grounds that it was barred by the state's immunity under the Eleventh Amendment. *See Ulaleo v. Paty*, 902 F. 2d 1395, 1399–1400 (9th Cir. 1990).

The Pele Defense Fund also challenged the land exchange in state court. In *Pele Defense Fund v. Paty*, the Hawai'i Supreme Court held that the Ninth Circuit's decision in *Ulaleo*, and the doctrine of res judicata, barred relitigation of most claims regarding the land exchange. *Pele Defense Fund v. Paty*, 73 Haw. 578, 837 P.2d 1247 (1992).

The case, however, was an important victory for Native Hawaiians who used the Wao Kele o Puna area for hunting, gathering, and religious and cultural purposes. The Hawai'i Supreme Court recognized that customary and traditional rights, which were thought to be limited by residency within an *ahupua'a*, could be exercised for subsistence, cultural, and religious purposes on undeveloped lands *beyond* the boundaries of the *ahupua'a* of residence, where "such rights have been customarily and traditionally exercised in this manner." *Id.* at 1272. On remand to the Third Circuit Court of Hawai'i, Pele Defense Fund members were able to validate their assertions that they exercised subsistence, cultural, and religious practices in Wao Kele o Puna—beyond the boundaries of the *ahupua'a* in which they actually resided—in accordance with ancient custom and tradition. The court permanently enjoined Campbell Estate from excluding Hawaiian subsistence or cultural practitioners, their *'ohana*, and those accompanying them from entering undeveloped portions of the land to perform customarily and traditionally exercised subsistence and cultural practices. *See Pele Defense Fund v. Estate of James Campbell*, Final Judgment, Civ. No. 89-089 (Haw. 3d Cir. 2002), at 2.

For many indigenous peoples, environmental justice is largely about belief systems that connect their history, spirituality, and livelihood to the natural environment.

Efforts to stop geothermal development in Wao Kele o Puna also took the form of civil disobedience and political protest. In March 1990, more than 1,000 protestors, led by the Pele Defense Fund and the Big Island Rainforest Action Network, marched to the locked gates leading to Campbell's geothermal site in Wao Kele o Puna; more than 100 people were arrested. *See* Theresa Dawson, *Hawaiian, State Agencies Race to Reclaim Wao Kele O Puna from Campbell Estate*, ENVIRONMENT HAWAI'I, Oct. 2005, at 5.

Ironically, even with government support, Campbell's geothermal partner, True Geothermal Developers, could not make good on the promise of geothermal and in 1994 the project was abandoned. *Id.* The land lay idle, and in 2001, Campbell Estate, which by its own terms is set to dissolve in 2007, announced its intent to sell Wao Kele o Puna.

Pele Defense Fund representatives immediately met with the Hawai'i project manager of the Trust for Public Land (TPL), a national nonprofit land conservation organization, to explore how Wao Kele o Puna could be preserved. TPL, working with the State Department of Land and Natural Resources (DLNR) over a several-year period, was able to get $3.4 million from the federal Forest Legacy Program, which protects forests by providing federal funds to buy conservation easements over, or title to, important lands for purchase of Wao Kele o Puna. Campbell Estate, however, was asking $3.65 million; TPL and DLNR were $250,000 short. *Id.* at 3. The Office of Hawaiian Affairs (OHA), established under the Hawai'i State Constitution to receive a portion of the revenues generated from ceded lands and to act to better the conditions of the Native Hawaiian people, stepped forward to provide the additional funding. *See* HAW. CONST. art. XII,

§§ 5-6; HAW. REV. STAT. ch. 10.

OHA had provided partial funding for a previous TPL acquisition, but the agreement reached by OHA, TPL, and DLNR was groundbreaking—OHA would receive title to Wao Kele o Puna. TPL negotiated the deal for the property, purchased it from Campbell Estate, and then conveyed Wao Kele o Puna to OHA in July 2006.

Although state law allows OHA to hold title to lands, it has never had a land base and admittedly lacks land management experience. Thus, under an agreement reached by OHA and DLNR, they, along with the surrounding communities, will manage the forest in partnership until OHA is ready to take over the responsibility on its own. The concept is that DLNR will teach OHA about modern land-management practices, while OHA will educate DLNR about traditional Hawaiian ones.

The reclamation of Wao Kele o Puna is the first return of ceded lands to Native Hawaiian ownership since the 1893 overthrow of the Hawaiian kingdom and, for Native Hawaiians, holds promise as the beginning of a land base for a future Hawaiian nation. As OHA explained, it is "acquiring the area to protect the natural and cultural resources on the land, to guarantee that Native Hawaiians can continue to exercise traditional and customary activities on the land, and to ensure that OHA can pass it on to a sovereign governing entity." *See Agreement Announced to Protect More Than 25,000 Acres of Rainforest on Hawaii Island*, OHA Press Release, September 12, 2005.

These land reclamations are attempts to preserve Hawai'i's natural environment and to restore to Native Hawaiians a measure of self-determination, cultural restoration, and economic self-sufficiency.

Waimea Valley

Waimea Valley, a 1,875-acre tract of land on the north shore of O'ahu, is one of the last undeveloped watersheds on the island. The valley is an intact *ahupua'a*, a traditional Hawaiian mountain-to-sea land division that encompassed all of the resources needed by its residents and was managed to ensure sustainable use of resources.

Known as the "Valley of the Priests," Waimea Valley has been a sacred place for Native Hawaiians for centuries. In about 1090, O'ahu ruling chief Kamapua'a recognized the spiritual importance of the valley and awarded its oversight to *kahuna nui* (high priests) of the Pa'ao line. The *kahuna nui* erected *heiau*, or temples, in and around the valley, including Pu'u O Mahuka, O'ahu's largest *heiau*. The valley today also contains burial caves, agricultural terraces, ancient living sites, and countless cultural sites that have never been fully surveyed or inventoried. *See* Joseph Kennedy, *"Valley of the Priests": Highlights of Waimea Valley's Extraordinary History*, KA WAI OLA, Mar. 2006, at 19; Derek Ferrar, *"A Cultural Resource of the Highest Possible Order": Study Doubles Number of Known Archaeological Sites in Waimea*, KA WAI OLA, Mar. 2006, at 14.

In the 1800s, powerful Western influences swept nearly all Native Hawaiians from the valley and ended nearly 800 years of *kahuna nui* stewardship. In 1848, the MÇhele—a process advocated by Western business interests and legal advisors to King Kamehameha III—converted the Hawaiian communal land system into a Western private-property system and operated to strip Native Hawaiians of their lands. *See* Melody Kapilialoha MacKenzie, *Native Hawaiians and the Law: Struggling with the He'e*, 7 ASIAN-PAC. L. & POL'Y J. 7 (2006). After the last *kahuna nui*, Hewahewa, died, the newly formed Land Commission offered to give his last descendant outright ownership of about half of the valley on the condition that she abandon any claim to the rest. She was required to formally present a claim to the Land Commission by a certain time but failed to do so. She fell heavily into debt and had to mortgage and lease the land. The property was foreclosed after her death in 1886. *See* Kennedy, at 19.

Over the next twenty years, the valley changed ownership at public auction multiple times. It was bought in 1929 by a major pineapple and sugar cane company, which leased the land to cattle ranchers. After the attack on Pearl Harbor, the military built artillery positions and other installations around the valley.

The 1960s and 1970s ushered in a period of commercialism that further shadowed the valley's environmental and spiritual history. The Waimea Falls Ranch and Stables catered to tourists by offering stagecoach rides with actors who rode alongside playing "cowboys and Indians." A restaurant and gift shop was built, guided tours were offered in trolleys, and visitors could watch cliff diving or hula shows. *See* Kennedy, at 19; *see also Waimea Falls Park, Inc. v. Brown*, 712 P.2d 1136 (1985) (describing Waimea Falls Park, Inc.'s ownership interest in the property).

A 150-acre arboretum and botanical garden was then established for native, threatened, and endangered plants from Hawai'i and around the world. In 1996, however, a New York theme park developer purchased the valley by assuming the $12 million mortgage of Attractions Hawaii, the previous owner. The valley was transformed into an "adventure park," with all-terrain vehicle and mountain bike trails. Struggling financially, the developer tried to sell the

valley but was forced to place it under bankruptcy protection.

In 2002, the City and County of Honolulu filed suit to acquire the property through condemnation. As the trial to set a reasonable price for the valley neared in 2005, the city received an offer for settlement that would have divided ownership of the valley, with the developer retaining more than 1,500 acres in the back of the valley for the possible development of luxury residences. After intense community outcry, the City Council rejected the settlement.

On the heels of the Wao Kele o Puna acquisition, OHA and TPL, along with others, joined forces again to permanently protect the environmental and culturally important resources in the valley. After months of skillful negotiation and intense community organizing, it was announced in January 2006 that the valley would be saved. A unique alliance of the city, DLNR, OHA, the U.S. Army, and the Audubon Society purchased the valley from the developer for $14 million, with legal title assumed by OHA for eventual transfer to a future Native Hawaiian governing entity. The Audubon Society will continue to operate the Waimea Valley Audubon Center, an ecological and cultural visitor center, on about 300 acres of the valley. The agreement will keep the valley zoned conservation, and a public easement will further prevent future development.

As owner of the valley and in partnership with the DLNR, OHA has pledged to ensure the protection and preservation of the valley's native and endangered species and cultural and historic resources. Derek Ferrar, *Waimea Valley Saved!*, KA WAI OLA, Feb. 2006, at 8. For OHA and Native Hawaiians, the valley is about much more than the preservation of its lush environment. As OHA Chairwoman Haunani Apoliona observed, it is also about the valley's robust cultural and genealogical connection to the Hawaiian people: "There is a long genealogy and history to Waimea, as there is a long genealogy and history to our Hawaiian people . . . OHA will ensure that Native Hawaiians will have a direct benefit and relationship with Waimea Valley. OHA will also ensure that the people of Oahu, the State of Hawai'i, the nation and the world grow in respect for, are renewed by, care for and support, learn from and celebrate this land of our ancestors, Waimea Valley." *See* Crystal Kua & Leila Fujimori, *Agreement Preserves Waimea for $14.1 Million*, HON. STAR. BULL., Jan. 14, 2006, at A1.

Kaho'olawe

The island of Kaho'olawe is the smallest of the eight main islands in the Hawaiian archipelago. Centuries ago, ancient Hawaiians dedicated the island to Kanaloa, the god of the ocean, ocean currents, and navigation. Kaho'olawe was viewed as the physical embodiment of Kanaloa, and the god's *mana*, or spiritual power, was held within the island's soil. Also known as Kukulu Ka'iwi O Ka 'Āina, or "the bone of the land standing upright," and Kohemālamalama O Kanaloa, "the shining womb of Kanaloa," the island has been a center of religious, cultural, historical, and political importance to Native Hawaiians. *See* Noa Emmett Aluli & Daviana Pōmaika'i McGregor, *Mai Ke Kai Mai Ke Ola, From the Ocean Comes Life: Hawaiian Customs, Uses, and Practices on Kaho'olawe Relating to the Surrounding Ocean*, 26 HAWAIIAN JOURNAL OF HISTORY 235 (1992); *Kaho'olawe Island: Restoring a Cultural Treasure*, Final Report of the Kaho'olawe Island Conveyance Commission to the Congress of the United States, at 17 (Mar. 31, 1993). Carbon dating of archeological sites shows that the island was inhabited by 1000 A.D.

For hundreds of years the island was fruitful and supported Native Hawaiian communities that were skilled in astronomy, navigation, fishing, and adz making. The island's western tip was one point in the navigational triangle used to navigate between Hawai'i and the South Pacific. *Kaho'olawe Aloha No: A Legislative Study of the Island of Kaho'olawe*, at 35 (1978). Ancient Hawaiians from all of the islands also traveled to Kaho'olawe to deposit their troubles in special portions of the island in acts of spiritual cleansing.

During the 1800s, Western colonialism dramatically reduced the island's population. Although no sale of any part of the island was made, in 1858 a lease of the entire island was granted for sheep ranching, marking the beginning of years of ranching operations. Throughout the ranching period, the uncontrolled grazing of cattle, sheep, and goats contributed to the massive erosion and environmental degradation of the island. Peter MacDonald, *Fixed in Time: A Brief History of Kahoolawe*, 6 *Hawaiian Journal of History*, at 73 (1972); Carol Silva, Environment Impact Study Corp., *Kaho'olawe Cultural Study Part 1: Historical Documentation*, for the Dept. of the Navy, at 76 (1983).

In 1898, Kaho'olawe, which was Hawaiian government land, was "ceded" to the United States upon annexation of Hawai'i. *See* Stephen Kinzer, *Overthrow: America's Century of Regime Change from Hawaii to Iraq* (2006) (describing overthrow of Hawaiian nation).

Through a lease with the Kaho'olawe Ranch Company, the U.S. military began its use of Kaho'olawe as a practice target for aerial bombs in the 1920s. During World War II, the U.S. government took control of the island, banned all civilian access, and closed traditionally used fishing areas. In a 1953 executive order, President Eisenhower set the island aside for massive target practice by navy bombers. The navy conducted ship-to-shore bombardment of the island and submarine commanders tested torpedoes by firing them at Kaho'olawe's shoreline cliffs. The bombing of Kaho'olawe (including surface-to-air missiles and underwater and surface high-explosive detonations) continued unabated for nearly half a century, causing massive damage to hundreds of cultural sites and fragile environmental resources.

When Hawai'i became a state in 1959, the Admissions Act stated that lands set aside pursuant to any act of Congress, executive order, or proclamation of the presi-

dent were to remain the property of the United States if needed for continued use. *See* Admissions Act, Pub. L. No. 86-3, 73 Stat. 4. Thus, military control of the island was guaranteed for the unascertainable future.

By the 1970s, Native Hawaiians and nearby island residents could no longer accept the reverberations of bombs, the restricted fishing around the island, and the desecration of sacred lands. In 1971, Maui Mayor Elmer Cravalho and the nonprofit environmental organization Life of the Land brought suit against the Department of Defense under the newly enacted National Environmental Policy Act of 1969 (NEPA). In *Cravalho v. Laird*, Civ. No. 71-3391 (1972), the plaintiffs requested a halt to live-fire training and contended that NEPA required the navy to prepare an environmental impact statement (EIS) to document the effects of military use of the island. The navy responded that it planned to keep the island indefinitely, and if it were denied use of Kaho'olawe, it would be forced to cut back use of Pearl Harbor, thus depriving the state of a major source of income. The court did not order a halt to the bombing, but the navy was ordered to produce an EIS and the case was dismissed.

During the 1970s, a group of young Native Hawaiians founded the Protect Kaho'olawe 'Ohana (family), an organization dedicated to stopping the bombing and reclaiming Kaho'olawe for the Native Hawaiian people. An integral part of a growing political and cultural resurgence among Native Hawaiians, the group began a campaign to raise awareness about the destruction of their sacred land. In January of 1976, nine people landed on the island in an act of peaceful civil disobedience. Although the Coast Guard quickly escorted the protestors off the island and cited several for trespass, the 'Ohana continued its landings on the island. In conjunction with their continued landings, the 'Ohana filed a federal lawsuit against the Department of Defense, *Aluli v. Brown*, 437 F. Supp. 602, 604 (1977), to enjoin the navy from further bombing.

In early 1977, 'Ohana leaders George Helm and Kimo Mitchell returned to the island to search for two others who had remained on the island. In trying to paddle-surf back to Maui seven miles away, Helm and Mitchell were lost at sea. Their death marked a critical point in the 'Ohana's struggle to halt the bombings and reclaim Kaho'olawe.

While the *Aluli* appeal was pending in May of 1979, the 'Ohana and the navy began settlement negotiations. In October 1980, the parties entered into a Consent Decree. In it, the navy did not promise to cease live-fire training, but it did agree to use inert ordnance "to the maximum extent possible," prevent ordnance from landing in the surrounding waters and document and remove any that did, and clear ordnance from approximately 10,000 acres designated by the 'Ohana. The cleared areas were to be reserved for "religious, cultural, scientific, and educational purposes." *See Aluli v. Brown* Consent Decree and Order, Civ. No. 76-0380 (1980), at 4–5. The navy also promised to take measures to protect historic sites, which specifically included adz quarries and burial sites. *Aluli v. Brown* Consent Decree, at 9–11. Finally, the navy agreed to give the 'Ohana limited access to the island to implement its environmental and cultural restoration plan.

In March of 1981, the entire island was listed on the National Register for Historical Places and designated the Kaho'olawe Archaeological District. In 1990, nearly fifty years after the bombing began, President Bush halted the bombing of Kaho'olawe. The United States transferred title to Kaho'olawe to the state in May of 1994 and established a joint venture among the federal and state governments and the 'Ohana to oversee restoration of the island. The navy was given ten years and allocated $400 million to remove unexploded ordnance and to complete environmental restoration of the island.

The transfer and eventual control of the island was placed under the responsibility of the Kaho'olawe Island Reserve Commission (KIRC), part of DLNR. KIRC, now headed by Native Hawaiian Sol Kaho'ohalahala, has authority over all actions occurring on the island, including proper treatment of any burial sites discovered there and entering into stewardship agreements with Hawaiian organizations. KIRC works in partnership with the 'Ohana, which is the official steward of the island.

Four exclusive and perpetual purposes and uses of the island were made part of Hawai'i State law: the preservation and practice of customary and traditional Native Hawaiian rights for cultural, spiritual, and subsistence purposes; the preservation of the island's archaeological, historical, and environmental resources; rehabilitation, revegetation, habitat restoration, and preservation; and education. *See* H.R.S. Chapter 6K. Chapter 6K also guarantees that when a sovereign Native Hawaiian entity is established and recognized by the United States, the state will transfer management and control of Kaho'olawe to that entity.

The navy declared the island's cleanup complete in April of 2004. Even with the removal of 10 million pounds of metal, the cleanup fell far short of the promised 100 percent surface clearance and 30 percent subsurface clearance. About 70 percent of the island had been surface cleared, and about 9 percent was cleared to a subsurface level of four feet. Places on the island will likely never be cleared of ordnance. *See* Sterling Kini Wong, *Kaho'olawe Now*, KA WAI OLA, May 2006, at 10; Timothy Hurley, *Contractor Concludes Kaho'olawe Cleanup*, HON. ADV., Apr. 9, 2004, at B-1.

Despite the incomplete navy cleanup, KIRC and the 'Ohana carried on their restoration plans, including planting over 100,000 native species on the island. The current focus of restoration is to prevent further erosion and to build up soil and ground cover to enable reforestation. Once ground cover shrubs and grasses are restored, trees will be planted to further hold in soil and moisture, and

(Continued on page 79)

Tribes, Air Quality, and the National Tribal Environmental Council

Robert Gruenig

Not until 1990 did the nation's tribes receive delegated authority under the Clean Air Act (CAA), 42 U.S.C. §§ 7401-7671, to implement air programs. Since that time, a number of tribes have been successful in carrying out air quality programs, some considered groundbreaking. Through it all, the National Tribal Environmental Council (NTEC) has been at the forefront providing tribes with the necessary legal, policy, and technical assistance for their air quality management. In particular, NTEC has been instrumental in helping to develop a national tribal air organization; providing ongoing management and support of a regional air partnership involving tribes, states, and federal agencies; and seeking out other opportunities to benefit tribal air quality. Such support will continue to be necessary based on forthcoming challenges faced by tribes.

Tribes first received the opportunity to obtain delegated authority to implement CAA programs under the 1990 CAA Amendments. Under Section 301(d) of the CAA, the U.S. Environmental Protection Agency (EPA) was authorized to "treat Indian tribes as States," allowing these tribes to seek treatment-as-a-state (TAS) status. 42 U.S.C. § 7601(d)(1)(A). To obtain such status, a tribe must be federally recognized; have a governing body that carries out "substantial governmental duties and powers"; carry out functions that "pertain to the management and protection of air resources within the exterior boundaries of the reservation"; and have the capability to manage and protect air resources. 42 U.S.C. § 7601(d)(2).

Under the amendments, EPA was required to issue a rule specifying those CAA provisions "for which it is appropriate to treat Indian tribes as States." 42 U.S.C. § 7601(d)(2). Finalized in 1998, the Tribal Authority Rule (TAR), 40 C.F.R. §§ 49.1-.11, recognizes tribal authority as "treatment in the same manner as states," which necessitates that tribes meet the statutory requirements discussed above and provide substantive proof in their eligibility application, including statements, maps, and other supporting documentation. *Id.* § 49.7. A tribe may seek a TAS determination from EPA simultaneously with a CAA program application or may do so separately. *Id.* Regardless, a 30-day notice and comment period is typically required to gather relevant input from the public concerning a tribe's TAS application. *Id.* § 49.9 (c). In addition to requiring a TAS determination before a tribe may adopt a CAA program, the TAR contains other important provisions dealing with program flexibility and capacity-building support.

The TAR builds in program flexibility in recognition that tribal air programs are still in their infancy. For example, a tribe may under certain conditions be allowed to adopt and implement only portions of what would be considered a complete CAA regulatory program. A tribe may adopt selected portions of a CAA program as long as these portions are considered "reasonably severable" and not integral to those provisions not adopted. Specifically, a CAA program may require a number of responsibilities, such as developing emissions inventories, monitoring for specific air pollutants, and modeling for future air quality effects. Depending upon the program, the tribe may be able to limit its efforts to developing emissions inventories and monitoring, while relying on EPA to conduct modeling activities. Determining what aspects of a program are "reasonably severable" requires significant communication between a tribe and its regional EPA office before the agency makes a final determination.

The TAR provides additional flexibility for tribes by providing that they do not need to follow the same deadlines imposed on states for adopting their CAA programs. 40 C.F.R. § 49.4. This is perhaps one of the more important aspects of the TAR, recognizing that incipient tribal air programs do not have the same resources (such as staff) as existing state agencies may have and also that EPA would be overwhelmed if it were forced to consider CAA regulatory programs for the more than 560 federally recognized tribes located in the United States. Despite this flexibility in the approval process, once a CAA program is adopted, a tribe must adhere to the deadlines outlined under the program. *See* Model Tribal Implementation Plan (TIP) Template for Section 309 of the Regional Haze Rule, at 13 (concerning tribes and applicable deadlines), *available at* www.wrapair.org/309/documents/FinalDocs/FINAL_TIP_TEMPLATE.pdf. Also, if a tribe is unable or unwilling to adopt a CAA program and EPA determines that such a program is "necessary or appropriate to protect air quality," the agency is supposed to adopt a federal implementation plan in lieu of a tribal program. 40 C.F.R. § 49.11(a).

Capacity-building support consists of EPA's providing the financial and technical assistance for tribes that choose to implement a CAA program. Unfortunately, such support from EPA has been constrained of late because of dwindling federal resources, which can have an obvious negative impact on the development of tribal programs.

Mr. Gruenig is a senior policy analyst/attorney for the National Tribal Environmental Council in Albuquerque. He currently serves as the organization's interim executive director. He may be reached at bgruenig@ntec.org.

TAS status plays an important part in determining the amount of money that a tribe must bring to the table to match federal grant money for CAA program implementation. In the absence of tribal hardship, if TAS status exists, a tribe is required to provide only a 5 percent match for the first two years of its CAA program with a 10 percent match requirement for subsequent years. Without TAS status, a tribe must provide a 40 percent match.

A number of tribes have obtained TAS status. Some of them are approved to carry out certain preliminary activities in development of air programs, while still others have assumed, or are in the process of assuming, CAA programs. In addition, some tribes have been conducting preliminary activities that do not require TAS status, such as developing emissions inventories and monitoring for both ambient and indoor air pollutants.

The Navajo Nation and Gila River Indian Community are good examples of tribes that have moved beyond these preliminary activities and toward actual CAA regulatory authority. In October 2004, the Navajo Nation received delegated authority to take over Title V, permitting responsibility from EPA for twelve major stationary sources on the tribe's reservation. *See* 69 Fed. Reg. 67578 (Nov. 18, 2004). The Gila River Indian Community is in the final stages of adopting a federally approved tribal implementation plan that will allow the tribe to regulate air pollution emissions from all sources within its jurisdiction. These examples are just two of the many programs being developed and implemented in Indian country and reveal a true concern on the part of tribes about their air quality and legitimize them as true partners in the effort to improve such air quality.

The Role of NTEC

NTEC is a tribal organization established in 1991 that includes among its missions to "enhance each tribe's ability to protect, preserve and promote the wise management of air, land and water for the benefit of current and future generations" through the use and maximization of existing resources. At present, NTEC has 184 members and provides its services to all federally recognized tribes. NTEC's approach to supporting tribes recognizes that each tribe is unique, having its own diverse land area, different views and perspectives, and unique governing structure. NTEC's activities are critical to the overall success of tribal air programs, given that resources for tribal air programs are decreasing and data gaps still remain for many parts of Indian country. With respect to air in particular, NTEC has facilitated tribal participation in a number of forums, most notably the National Tribal Air Association (NTAA), the Western Regional Air Partnership (WRAP), and the National Carbon Offset Coalition (NCOC), all with the intent of protecting and preserving tribal air quality.

NTEC currently provides management and facilitative support to the NTAA, a national tribal organization dedicated specifically to addressing air quality needs and concerns in Indian country. The idea for the NTAA was conceived in 1999. To translate this idea into action, while understanding that it was important to ensure that tribes set directions for themselves and interact with other governments on air quality issues, NTEC developed and submitted a resolution to the National Congress of American Indians in support of the prospective tribal air organization. With this support in place, NTEC and EPA entered into a three-year cooperative agreement in 2001 that provided the necessary resources for creation of a national tribal air organization, now known as the NTAA, which focuses specifically on tribal policy issues. The NTAA has had an executive committee and bylaws since October 2002 and has been actively moving toward fulfilling its mission to "collectively advance air quality management policies and programs, consistent with the needs, interest, and unique legal status of American Indian Tribes, Alaska Natives and Native Hawaiians." The NTAA has five major goals: (1) advocating and advancing tribal environmental, cultural, and economic interests in the development of air policy at all levels of government (e.g., tribal, federal, state, local, and international); (2) promoting the development, funding, and capacity building of tribal air quality management programs; (3) promoting and facilitating air quality policy and technical information that may include research and scientific and medical studies; (4) advancing the recognition and acceptance of tribal sovereign authority by conducting effective communication and outreach to state, local, federal, and international agencies and the general public; and (5) encouraging and supporting appropriate consultation with all tribal governments in accordance with tribal structures and policies.

NTEC has played an integral role in helping the NTAA move toward the proper and effective implementation of the CAA in Indian country in order to protect the health and welfare of Native Americans. In this capacity, NTEC tracks developments in national air regulation, including opening and closing of comment periods, hearings, and other opportunities to influence policy, and ensures that tribes are informed of these activities and given an opportunity to comment and otherwise participate in NTAA responses and comments. NTEC also develops and distributes policy analyses of air issues with potential effects on tribes to ensure that NTAA positions are developed based on tribal input; ensures that federal air quality rules and regulations applicable to tribal lands are consistent with the intent of federal policies and regulations and with principles of federal Indian law and the trust responsibility; analyzes proposed legislation for potential positive and negative implications for tribes and provides comments as necessary; develops tribal input for proposed federal and state legislative changes; and works with EPA to facilitate integration of tribal programs into the agency's approach to air pollution management in Indian country.

With respect to education and outreach, the NTAA holds conferences and workshops to enhance understanding of air quality issues as they relate to tribes. Conference topics have included the development of national strategies to support tribal air programs, crafting a federal budget that properly addresses tribal air quality issues, effective communication of tribal air program needs, partnerships between air quality

management and economic development, and creating a sound tribal air monitoring strategy. These conference topics have been complemented by workshops that give advice on practical topics such as developing effective public comment letters, grant writing with performance-based measures, and cap-and-trade programs with a tribal perspective. Further, the NTAA cosponsors a state implementation plan (SIP), development workshops with EPA, and the Institute for Tribal Environmental Professionals to provide tribes with information on the CAA and national standards; an in-depth look at the SIP process; ideas and tools for getting involved with the SIP development process; and useful contacts and other helpful tidbits. This effort will be complemented by a project being developed under one of NTEC's other programs, WRAP, which will provide tribes with an analysis of regional haze SIPs and federal implementation plans and their implications for tribal programs and air quality. Beyond these specific conferences and workshops, the NTAA regularly makes presentations to both tribal and nontribal audiences in other fora, cosponsors a monthly Tribal Air Policy call with EPA, and provides regular policy updates through the organization's quarterly newsletter and weekly update. All of these activities are part of a toolbox for tribes to use in addressing tribal air quality issues on a local, regional, and national level, something that was largely nonexistent prior to the creation of the NTAA.

At the national level, a number of air rules and regulations have been issued that could have an adverse impact on tribes along with guidance. Thus, the NTAA regularly attends CAA Advisory Committee meetings and has an official seat on its Subcommittee on Air Quality Management, both of which serve as a means to publicly communicate the adverse impact faced by tribes from such actions. The NTAA has also moved swiftly on its own to set up conference calls, facilitate individual and public meetings with EPA and other entities, provide guidance to tribes on specific matters through position and information papers, and develop comment letters for tribes to use in the development of their own comments. Among the recent rules and regulations of most importance to tribes have been the Clean Air Mercury Rule (CAMR), 40 C.F.R. Parts 60, 63, 72, and 75 (2006), and proposed revisions of the National Ambient Air Quality Standards for fine and inhalable coarse particulate matter, 40 C.F.R. Part 50 (2006), both eliciting the greatest number of tribal comments to date concerning any air rule or regulation.

With respect to the CAMR, the NTAA's comments took the position that maximum achievable control technology standards should be enforced by EPA in lieu of a cap-and-trade program. The comments raised several unanswered questions such as what are the potential "hot spots" that could be created under the rule in relation to tribal lands; and how risk assessment and cost-benefit analysis should include tribal values, unique exposure pathways, and tribal consumption levels. In addition, the NTAA commented that no tribal consultation had occurred in developing the CAMR, so the EPA failed to consistently follow its Indian Policy that acknowledges both a federal trust responsibility on the part of EPA and a requirement that the agency consult on a government-to-government basis with tribes concerning federal actions. *See* EPA Policy for the Administration of Environmental Programs on Indian Reservations, November 8, 1984.

As for the proposed particulate matter (PM) standard revisions, the NTAA was most vocal about a lack of standards that would apply to rural areas, the place where the majority of the nation's tribes reside, and the accompanying monitoring guidelines. The proposed revisions would focus on areas dominated by resuspended dust from high-density traffic on paved roads and PM generated by industrial sources, and essentially exclude any ambient mix dominated by rural windblown dust and soils, and PM generated by agricultural and mining sources (final revisions no longer include agricultural or mining source exemptions). Because the proposed revisions would only require PM monitors in metropolitan areas with populations of 100,000 or more, it would also be impossible to detect a PM standard violation in rural areas because funding for such monitors outside these metropolitan areas would not likely be available.

NTEC has played an important role in policy development within the WRAP, particularly that related to air pollution prevention, economic analysis, fire emissions, and cap-and-trade programs.

In addition to providing ongoing support to tribes on a national scale through the NTAA, NTEC has also been involved with regional initiatives such as WRAP. WRAP covers a geographical area that represents more than 450 tribes and serves as the successor organization to the Grand Canyon Visibility Transport Commission, an entity created to provide EPA with recommendations on how to eliminate visibility impairment at Grand Canyon National Park. While the focus of the organization remains on visibility, which is not necessarily a high tribal priority, WRAP has been most beneficial to tribes with respect to the equal partnership that now exists among it, states, and federal agencies. These three entities, along with industry and environmental groups, operate in an environment where positive collaborative and collegial discussions and negotiations on western air quality issues are the norm.

NTEC is identified in the WRAP bylaws as comanager of the organization along with the Western Governors' Association. As part of its comanagement duties, NTEC handles such tasks as ensuring that tribal participants in the

WRAP are continuously informed of the processes, schedules, issues, budgets, proposals, work products, and decisions of WRAP committees, forums, and workgroups; providing specialized assistance to WRAP concerning tribal-related matters; working collaboratively with tribal leaders and representatives to help them reach consensus on matters of concern; and utilizing existing research and analysis and drafting position and policy papers on a vast range of regional haze issues. In all of these activities, NTEC works diligently to make sure that tribal needs and concerns are advanced through WRAP's ongoing technical and policy efforts.

As far as technical efforts are concerned, NTEC has played an integral role in addressing such matters as tribal emissions inventories and monitoring. Perhaps most important for tribal emissions inventories has been development of the Tribal Emissions Inventory Software Solution, better known as TEISS, which allows tribes to create emissions inventories through user-friendly software that is technically defensible to the EPA and provides reports and maps in support of tribal air programs. Prior to the availability of this software, few inventories had been developed because of the time and financial resources involved with such a task. The software, which is available free of charge to the nation's tribes, has helped lead to the development of more than thirty tribal emissions inventories in a short time. While some tribes have been developing emission inventories through TEISS, the WRAP has also contributed resources to develop additional tribal inventories for point and area sources, all in support of effective regional haze-planning efforts. All in all, the WRAP region has the largest collection of tribal emissions inventories in the nation.

As for monitoring, NTEC has worked closely with WRAP's Tribal Data Development Work Group (TDDWG) in conducting a three-part assessment of Interagency Monitoring of Protected Visual Environments (IMPROVEs) monitors in the West to discern the causes of haze on tribal lands. The assessment focused on the six western tribal lands containing IMPROVEs monitors; an identification of reservations where source category impacts could be quantified using the data analyzed for causes of haze from nearby monitoring sites that are on state and federal lands; and an analysis of those tribal lands unrepresented by any IMPROVEs monitors. With respect to the third part of this assessment, eleven tribes were identified as being unrepresented by IMPROVEs monitors. These tribes can therefore make a strong case for additional monitoring resources. As a result of the TDDWG's findings, both tribal and nontribal representatives are discussing the possibility of utilizing the project's methodology for assessing the representativeness of other air quality monitors.

NTEC has played an equally important role in policy development within WRAP, particularly that related to air pollution prevention, economic analysis, fire emissions, and cap-and-trade programs. As for air pollution prevention, WRAP was charged with drafting documents on energy efficiency and renewable energy as a means to develop pollution control and prevention strategies to improve visibility throughout the WRAP region. Based on a concern voiced by both tribes and NTEC, WRAP participants decided to draft two separate sets of documents, one that focused specifically on Indian country and the other that focused on states. The tribal documents now provide tribal leaders and representatives with valuable resources concerning energy efficiency and renewable energy that they can use in conjunction with their economic development activities.

On the economic development front, NTEC staff was closely involved with creation of an economic analysis framework by the WRAP's Economic Analysis Forum (EAF) that was followed by a framework application test. The intent of the framework is to prescribe a method for assessing the costs, benefits, and distributional issues associated with regional air quality control strategies. Of particular importance to NTEC, the seventeen-step framework incorporates a distributional analysis component intended to assess tribal effects that are due to the adoption of specific air quality control strategies. To test the framework, the EAF conducted a test of three states and three tribes (the Confederated Salish and Kootenai Tribes, Salt River Pima-Maricopa Indian Community, and Spirit Lake Nation) in an effort to discern the difference between adopting a mandatory versus a voluntary diesel retrofit program. With this test, tribes now have a means to better assess the effects of different air control strategies on their overall economic development. NTEC is now working on development of a tribal economic database design that can take many other framework elements and incorporate them into a software program for easier use by a tribe, similar to the user-friendly approach provided by TEISS.

With every WRAP product comes a genuine concern over what the effect may be on tribes and their respective culture. This concern is exemplified in the work of WRAP's Fire Emissions Joint Forum (FEJF). Initially, little thought was given to tribal practices in documents produced by the FEJF, which addressed such matters as fire categorization, enhanced smoke management plans, annual emission goals, and fire tracking systems. WRAP's tribal participants and NTEC were equally concerned about how tribal burning practices would be categorized and that such practices should be exempted from any efforts to address fire emissions in the West. Ultimately, the FEJF sided with these tribal participants and NTEC, as noted in the FEJF's Enhanced Smoke Management Policy that prevents application of the policy to "Native American cultural non-vegetative burning for traditional, religious or ceremonial purposes." This regulation has subsequently helped other WRAP committee and forum participants to become more sensitive to tribal issues and further encourages the existing partnership among tribes, states, and federal agencies.

Finally, NTEC has played an important role in helping

to develop cutting-edge policy on cap-and-trade programs and the integration of tribes into such programs. Under the Annex to the Regional Haze Rule (RHR), 40 C.F.R. Part 51 (1999), states and tribes had the option of developing a cap-and-trade program to help reduce western sulfur dioxide emissions, and WRAP ultimately chose this option. During the development, WRAP was highly scrutinized by environmental groups, industry, and others for its approach to tribes, which for the most part do not have the major sources necessary to participate in a traditional cap-and-trade program. NTEC—looking to move beyond historical emissions and encourage the consideration of other equitable factors in allocating emission credits under a cap-and-trade program—developed a paper on the matter. This paper laid the groundwork for the creation of a tribal set-aside allowance based on equity purposes that could be used in a number of ways for the benefit of tribes. While the Annex was eventually overturned in court, *Ctr. for Energy and Economic Dev. v. U.S. Envtl. Prot. Agency*, 398 F.3d 653 (D.C. Cir. 2005), the set-aside allowance remains in the SIPs being developed by five states under section 309 of the RHR (i.e., Arizona, New Mexico, Oregon, Utah, and Wyoming). 64 Fed. Reg. 35,714, 35,769 (July 1, 1999). A precedent has now been set for including tribal set-asides in other cap-and-trade programs. In addition, NTEC plans to assist in the development of options and a mechanism for the distribution and management of the 20,000-ton sulfur dioxide tribal set-aside allowance expected under the cap-and-trade program.

NTEC is also moving forward on other efforts, some of which require more detailed analysis and research. Such efforts will include work on CAA Section 308 tools for the development of regional haze TIPs, severability under the RHR, and development of a long-term strategic plan.

With respect to Section 308 development, NTEC expects to help develop the necessary tools for tribal air program managers and planners to submit regional haze TIPs by December 2007 and beyond. Some of these tools will include a guidance document for those tribes interested in developing and submitting TIPs, a model template appropriate for such TIPs, and codevelopment of a tribal protocol with EPA concerning the obligations that a tribe and the agency will have regarding submission, review, and acceptance of a TIP. These tools were previously completed by NTEC for Section 309 TIPs (*available at* www.wrapair.org/tribal/index.htm). With such tools in place, efforts by a tribe to adopt a regional haze TIP should be streamlined and simplified.

As noted in the earlier discussion of the TAR, tribes have the option of adopting portions of CAA programs. Underlying many issues for tribes in WRAP has been an uncertainty about EPA's policy for implementation of the RHR on tribal lands. To assist in alleviating some of this uncertainty, NTEC will help develop a set of policies to assist EPA in determining which elements under Sections 308 and 309 of the RHR are reasonably severable. Without such policies in place, tribes contemplating development and submission of a TIP may be hesitant to do so because of the tremendous amount of resources required to implement and manage a full regional haze program. Instead, some of these tribes might prefer submitting "severable" implementation plans that focus on issues of concern to them, such as stationary sources, fire emissions, or dust emissions. These policies developed by NTEC could therefore help streamline the burdensome process associated with development, submission, and acceptance of TIPs, which would then contribute to a faster response from tribes and the EPA.

Looking forward, WRAP is faced with the current task of providing the policy and technical tools necessary to develop and submit regional haze implementation plans by the end of 2007. WRAP appears unsure, however, about what regional air quality issues can or should be addressed beyond this period. While some valuable discussions and activity have recently occurred regarding climate change and mercury, a more focused effort needs to take place, particularly with an expected reduction in federal resources and the continuing need for tribes to build capacity to the point where they can effectively develop, submit, and manage TIPs. NTEC therefore intends to engage western tribes in a dialogue concerning their needs and concerns with respect to regional air quality issues and thereafter develop a document that will be helpful in making a case to EPA, congressional representatives, and others in continued funding support of WRAP and particularly the needs of western tribes. Without such a dialogue and document, NTEC anticipates that regional planning organization monies as a whole will be severely limited to the point where remaining monies may be insufficient to address the needs of either states or tribes.

Carbon Sequestration

NTEC and its staff are working to ensure that tribal interests are considered and recognized in the ongoing discussion over carbon sequestration and global warming. Most recently, NTEC entered into a partnership with the NCOC to create a national tribal carbon offset portfolio for carbon sequestration purposes. First and foremost, the sequestration achieved under this program will help offset the environmental impacts of global warming. A secondary benefit to this program is that this sequestration will become a marketable commodity that could provide tribes with an additional source of revenue through the sale of carbon sequestration units on the Chicago Climate Exchange. The intent is to get a number of tribes to commit specific portions of their lands to tree planting, which would then become part of an aggregated portfolio to be sold on the exchange. Through this partnership, tribes would receive assistance in planning carbon sequestration activities and documenting the carbon sequestration units acquired through such activities. Currently, at least one tribe has committed 5,000 acres

(Continued on page 79)

Twenty Years Later–Tribes and the Superfund Program

Lisa Gover

In 1980, Congress responded to the problem of uncontrolled and abandoned hazardous waste sites by directing the U.S. Environmental Protection Agency (EPA) to locate, investigate, and clean up the worst contaminated sites nationwide. The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, or Superfund), 42 U.S.C. §§ 9601–9675, created a process for identifying high-risk sites and directed EPA to develop the process that would be followed for cleaning up those sites. The formal process developed for cleaning up contaminated sites is referred to as the National Contingency Plan (NCP). 40 C.F.R. Part 300. Sites meeting a certain score using the Hazard Ranking System (HRS) were identified as the highest-priority sites for cleanup under the Superfund program and were placed on the National Priorities List (NPL). 40 C.F.R. § 300.425.

In 1986, the Superfund Amendments and Reauthorization Act (SARA), Pub. L. No. 99-499, amended CERCLA to, among other things, clarify tribal government roles in Superfund processes and formally recognize tribes as natural resources trustees. As amended by SARA, CERCLA states that federally recognized tribes are "afforded substantially the same treatment as States" with respect to certain listed provisions of CERCLA. 42 U.S.C. § 9626(a). The listed provisions are Section 103(a) (regarding notification of releases), Section 104(c)(2) (regarding consultation on remedial actions), Section 104(e) (regarding access to information), Section 104(i) (regarding health authorities), and Section 105 (regarding roles and responsibilities under the NCP and submittal of priorities for remedial action, but not including the provision regarding the inclusion of at least one facility per state on the NPL). 42 U.S.C. §§ 9603(a), 9604(c)(2), 9604(e), 9604(i), and 9605. In addition, the 1986 Amendments added a new Section 107(f) regarding natural resources damages, that includes specific authorization for tribes to act as trustees for natural resources. 42 U.S.C. § 9607(f).

The significance of assigning tribes "substantially the same treatment as a State" has at least two CERCLA-specific consequences. First, tribes are specifically excluded from identifying contaminated sites for inclusion on the NPL (a prerogative of states sometimes referred to as "the magic bullet"). Second, tribes are exempt from the funding match requirement and the operation and maintenance costs of site remediation.

Another provision of the 1986 Amendments that should be noted is the addition of Section 121, which specifies that Superfund remedial actions must meet all applicable or relevant and appropriate regulations (ARARs). 42 U.S.C. § 9621. ARARs include standards and requirements drawn from other federal laws and regulations, as well as from state environmental laws and regulations. Though neither the statutory language nor the regulatory definition, 40 C.F.R. § 300.5 (defining "applicable" and "relevant and appropriate"), specifies tribal law as a source of ARARs, the various provisions in other federal laws authorizing treatment of tribes like states make it clear that tribal environmental standards and regulations are ARARs. In addition, ARARs may be based upon tribal government involvement in review processes set out in federal laws.

EPA has made conscientious and responsible efforts to integrate tribal governments into the media-specific regulatory programs under statutes that authorize EPA to treat tribes as states, including the Clean Air Act, 42 U.S.C. §§ 7410(o), 7601(d)(1)(A), and the Clean Water Act, 33 U.S.C. § 1377(e). Indeed, a number of cases have involved challenges to EPA decisions that supported tribal government environmental protection programs. *E.g.*, *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996); *Montana v. U.S. Environmental Protection Agency*, 137 F.3d 1135 (9th Cir. 1998).

This article lays out principles and methods for effectively involving tribal governments in the investigation, assessment, remediation, and restoration processes of addressing contaminated sites under the CERCLA/Superfund program (and other cleanup programs) that will advance tribal environmental and natural resources protection. The recommendations have been discussed in public and private meetings with EPA and other government officials and at conferences and seminars over the many years since Congress adopted the 1986 Amendments. This article presents these recommendations under three headings: integration of tribes into

Ms. Gover currently serves as director of the Eight Northern Indian Pueblos Council Environment Department and can be reached at Gover5407@comcast.net. She formerly served as director of the National Tribal Environmental Council Superfund Program. She is Pawnee and Comanche.

planning, tribal concerns with risk assessment, and funding.

EPA's Office of Solid Waste and Emergency Response (OSWER) provides policy, guidance, and direction for the Superfund program and other efforts to clean up contaminated properties. (Other such programs for contaminated properties include those authorized by amendments to CERCLA enacted in the Brownfields Revitalization and Environmental Restoration Act of 2001, Pub. L. No. 107-118, title II.) OSWER is also the office responsible for budgeting. In 1998 and 1999, as the result of a national conference cosponsored with the National Tribal Environmental Council (NTEC) and separate forums sponsored by EPA Region 9, EPA committed to taking a number of actions to support tribal hazardous waste and contaminated site cleanups. The forums included the three western states in which the majority of tribal lands are located. In 2004, however, EPA's Office of Inspector General (IG) reported that the EPA/OSWER commitment to implement tribal Superfund strategies, and to develop tribal Superfund policy, was inadequate. The IG found that EPA had yet to develop a tribal Superfund strategy, even though OSWER began developing a strategy in 2002. The IG recommended that the Assistant Administrator for OSWER take a leadership role in developing a Superfund tribal strategy and policy, and deploy resources accordingly. OIG Report No. 2004-P-00035, "Tribal Superfund Program Needs Clear Direction and Actions to Improve Effectiveness" (September 30, 2004) (hereinafter "*IG Report*").

Twenty years have passed since the 1986 Amendments, and tribal resources continue to be threatened by hazardous substance contamination. Very few tribes, however, have been able to assume a partnership role in the Superfund processes in a manner similar to that of states, although research conducted by the NTEC, supported by OSWER, identifies hundreds of NPL caliber sites that potentially impact tribal resources. Steps must be taken to ensure the integration of tribal governments into Superfund partnerships.

Integrating Tribes into the NCP

Tribes must be included as part of the planning processes, at the earliest stages, in collaboration with EPA, potentially responsible parties, and with other natural resources trustees. For sites on Indian lands, the tribe needs to be considered for the lead agency role to the extent that the tribe wishes to assume such role. For sites near Indian lands, a tribe (or tribes) should be involved to the extent necessary to ensure that tribal interests and considerations are addressed in all site assessment, remediation, and restoration planning and implementation activity.

Over the past twenty-five years, the Superfund program has assessed more than 6,000 contaminated sites. The database includes sites that are on the NPL or being considered for the NPL. Sites that have been determined to be contaminated or the subject of a release are referred to as Comprehensive Environmental Response, Compensation and Liability Information System (CERCLIS) sites. *See* http://www.epa.gov/superfund/sites/cursites. Of these, 600 are within a 50-mile radius of tribal lands. Approximately 270 tribes are potentially affected by the identified CERCLIS sites. As the *IG Report* recognized, assessing the potential for impacts to natural resources of concern for tribes cannot be limited to sites within formal reservation boundaries.

Given the number of sites that potentially affect tribal lands, tribal consultation and collaboration should be exercised as a regular part of EPA business as a way to develop meaningful partnerships and effective Superfund administration. Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments." provides that agencies shall be guided by certain fundamental principles (including the trust relationship; the rights of, and federal support for, tribal self-government, inherent tribal sovereignty, and self-determination) and that agencies shall adhere to certain criteria when formulating and implementing policies that have tribal implications. Exec. Order No. 13175, 65 Fed. Reg. 67249 (2000) (published at 25 U.S.C. 450 note). EPA activity pursuant to Superfund has had and continues to have tribal implications.

Providing notification and information to tribes and the solicitation of information from tribes can be accomplished efficiently and effectively given the widely developed use of electronic communications. These activities can achieve an important objective in meeting the directives of Executive Order 13175 by establishing regular and meaningful consultation and collaboration with tribal officials in the development of federal policies that have tribal implications.

In order to facilitate communications with the EPA, the tribes have created a Superfund Working Group (SWG) composed of lawyers, scientists, researchers, technicians and administrators—a remarkable group of tribal representatives. The SWG includes representatives of more than twenty tribes working to address contamination of tribal resources. Information on SWG can be found at www.ntec.org/Programs/Superfund.

Tribal consultation and collaboration can also be useful in the development of EPA's Strategic Plan goals and objectives. The Strategic Plan sets priorities for program funding and for implementing specific activities. Environmental Protection Agency Strategic Plan (2003-2008), http://www.epa.gov/cfo/plan/plan.htm. For tribes looking to influence funding and other EPA priorities, participation in developing the Strategic Plan may be essential for expounding tribal Superfund program needs.

EPA's Strategic Plan acknowledges that "Native Americans represent a segment of the population, along with elders and children" with different risk profiles from the national population profile. It also acknowledges that traditional foods and ways of life may lead to higher levels

of exposure to certain toxics. The plan also goes further in stating that EPA commits to focusing on sensitive populations by increasing understanding, building infrastructure and capacity, and providing information and tools needed to assess and prevent adverse impacts. Tribes can use such statements to impress upon EPA that support for recommendations regarding tribal involvement at Superfund sites is necessary to fulfill Strategic Plan purposes.

Tribal-specific information pertinent to planning should also be made part of the file for any Superfund site that affects tribal interests. Sources of tribal information include treaties, executive orders, judicial rulings, and other documents that serve as a record of tribal land uses, both current and historical. Where a tribe has enacted health and environmental laws and regulations, those should be included or referenced. Tribal research on cultural activities such as subsistence hunting, fishing, or gathering should be included. Tribes typically have interests in lands beyond their reservation boundaries, as well as in lands that they no longer own within their boundaries. Moreover, some such tribal interests are legally protected, such as by treaty provisions regarding traditional use areas or federal statutes that protect historic grave sites and other areas of religious or cultural significance to a tribe. Tribal resource uses and cultural concerns should be recorded in terms that both EPA and the tribe understand. This may involve tribal consultation, meetings, site visits, and other various forms of discussion with duly appointed tribal officials. The inclusion of documents in developing the administrative record will aid in creating thorough and comprehensive site assessment documents that account for tribal-specific criteria, including conceptual site models, field sampling plans, sampling and analysis plans, and quality assurance plans.

For EPA to better and more consistently include tribal considerations in the site narrative and to achieve partnerships with tribal governments as regulators and as natural resources trustees, it will be necessary for EPA to ensure that any contamination affecting tribal lands or resources triggers tribal consultation before sampling is done and the narrative written. Because thousands of sites have already passed the initial assessment and HRS phases, EPA should review each site's potential for affecting tribal resources and should provide opportunities for tribal involvement at each such site prior to making decisions. For those sites already on the NPL, this is a critical step. This review with tribal involvement should be instituted at every site, no matter what phase of the Superfund process the site has reached. This will involve extensive communications with tribal officials.

SWG considers risk communication to be of importance equal to risk assessment. Risk communication has to be open communication with tribal officials and with Indian communities and should consider that there are additional, perhaps different, communication considerations for tribal officials and tribal communities. It should be accomplished in a culturally relevant and sensitive manner. Tribal officials and community members may not understand the idea that there are levels of contamination that do not arouse concern for EPA. In talking about contaminated sites, terms such as parts per million (ppm) or parts per billion (ppb) may not convey useful information to tribal officials or tribal members.

Moreover, risk analysis uses terms that can have different meanings to different people. The use of undefined terms such as "safe" levels, "clean" water, "harm" or "harmful," "hazard" and "hazardous," and so on may be problematic. Whether such terms have precise definitions in the minds of federal officials, others—tribal officials and tribal members among them—may not clearly understand the use of such terms. They may disagree on a measure of contaminants that is considered "safe." Technical and regulatory terminology compounds the problem, (e.g., terms such as probability, risk analysis, and risk characterization). Federal representatives must also be aware of EPA's values and assumptions about an issue and be prepared to discuss them openly. It is necessary to recognize these as potential problems if officials wish to avoid unnecessary frustration.

Prior to discussions with tribal officials, EPA officials should also explain confidential communications and what protections for sensitive information exist to maintain confidential information. For instance, EPA should explain what information, if any, is exempt from release under the Freedom of Information Act. 5 U.S.C. § 552. This is necessary to protect information such as personal identification information, health information, intellectual property, and other special considerations where a tribe's resource information may be at stake. Communications should be monitored and carried out with frequent follow-up.

Cooperation enhances credibility. Battles that erode public confidence and agency resources are more likely when tribal input is not sought or considered. An affected tribe must be involved in the decision-making process from the beginning. EPA should involve the tribe at the earliest stage possible. Where a tribe has not been formally or officially notified of a release or a potential release of hazardous substances, EPA must correct such an omission.

Tribal Issues and CERCLA Risk Assessments

The particular concerns of tribes must be considered in CERCLA/Superfund risk assessment activities for sites on Indian lands. Where a site is not located on Indian lands, the tribe or tribes should be involved in the site investigations, research, site assessments, and risk assessment of contaminated sites that potentially affect their natural resources. Generally, EPA relies on a risk-based approach to decision making. Risk-based decisions include those to license or otherwise allow contaminant releases into the environment, acceptable contaminant levels for foods, and, of course, cleanup and restoration activity.

EPA has developed a detailed methodology for conducting risk assessments. *See* www.epa.gov/oswer/riskassessment/index.htm. Tribal governments are concerned with finding ways to ensure, and be assured, that resources are remediated and restored so that traditional resource uses (including subsistence or other traditional consumption) are not jeopardized or restricted. Tribes are also concerned with ensuring that EPA processes and tribal involvement do not result in a diminution of cultural practices or traditional food consumption.

To incorporate EPA's recognition of tribal resource uses, including food consumption differences and other relevant circumstances, SWG suggests that tribal data be infused in risk decisions. SWG recommends that EPA consider tribal uses of plants for foods, medicines, and materials. EPA's guidance contains valuable information that should be applied to tribal risk assessment activities, but it does not address some essential tribal risk considerations. Office of the Science Advisor, U.S. EPA, An Examination of EPA Risk Assessment Principles and Practices Staff Paper (March 2004).

From a tribal perspective, evaluations and risk assessments need to take into consideration multiple levels of biological organization. SWG experts agree that additional protections may be required for individuals because of age, gender, reproductive maturity, and so on. SWG further recommends that communities be evaluated both in the human and in the ecological assessments.

SWG also identified temporal issues that should be included in risk assessment. These include future and intergenerational considerations. Exposure risks can be added on and compounded for as long as a site poses risk (even when projected for thousands of years). Furthermore, tribal experts would like to see emphasis on cumulative risk considerations greater than those accounted for in conventional risk analyses. Cumulative risks need to be incorporated in risk assessment for evaluation.

There is a greater awareness and scientific acknowledgement of sensitive receptors. Sensitive receptors include children (and developing fetuses), elders, the infirm, precious plants, animals, media, specially protected areas, and endangered species. Sensitive receptors require more exacting stressor identification in the human and ecological risk assessments.

For tribal lands and resources, perhaps the most useful tool is a tribe-specific exposure scenario. An exposure scenario is a narrative and numerical representation of the interactions between human and/or ecological receptors and their immediate environment. Exposure scenarios include media-specific and pathway-specific exposure factors to estimate a dose to a target receptor engaged in defined activities in particular locations. For the general population, EPA uses typical scenarios to approximate residence, worksite, and recreation exposures. Tribal exposure scenarios depict additional exposures as a result of tribe-specific resource uses for segments of the tribal population.

The objective of specific exposure scenarios such as a subsistence scenario is to describe the resource uses and demonstrate potential additional exposures. In recent years, a few NPL sites have additional risk assessment documentation that features tribe-specific considerations. For example, the Spokane Tribe and the Leech Lake Band of Ojibwe were able to document all potential tribal exposure pathways for evaluation in tribe-specific exposure scenarios.

Tribal governments are concerned with finding ways to ensure that resources are remediated and restored so that traditional resource uses are not jeopardized or restricted.

A tribal resource use scenario should describe the historic and/or traditional resource uses of one or more specific tribes. This is necessary because tribal resource uses may be restricted or suppressed by many kinds of circumstances, especially where contamination exists. Tribal resource uses such as fish consumption may be suppressed due to damaged resources, awareness of contamination, lost access, and other reasons. Consequently, information on current resource use generally does not accurately describe traditional and cultural use patterns. A tribe may remediate and restore the environment so that historic patterns of resource use are possible.

SWG has made some specific recommendations for assessing tribal risks. Background (or reference) sampling areas used for comparative analysis should be selected so that they have relevance from both a matrix and tribal resource use perspective. Where peer-reviewed literature is relied upon, tribes should be funded to evaluate such studies.

With regard to identification of the affected population, SWG recommends that an affected tribe should be assessed as the exposed population rather than treated as a sensitive subset of a larger population because tribal (traditional and cultural) resource uses are distinct from use patterns of the general population. When tribes are treated as sensitive subsets of the larger general population, the sensitive subsets within the tribal population are often underassessed or not assessed at all. An exposed *tribal* population scenario will permit a more accurate assessment of

exposure risks to tribal children (including prenatal and neonatal effects) and elders, who are important sensitive subsets within the general tribal population. This recommendation conflicts with the EPA Strategic Plan.

SWG also believes that impacts to tribal cultural and spiritual sites can be assessed and should be portrayed in the context of the tribe's health and welfare, and that uncertainty analysis for assessed risks must be complete and thoroughly discussed in the risk assessment document. Uncertainty is inherent in risk assessment. For example, in sampling and testing the use of composite samples or variation within discrete samples, uncertainty permeates the testing results. In addition, children's health, endocrine disruption, and fetal development are often overlooked as sources of uncertainty. Scientific literature, along with other relevant information, should be used in the uncertainty analysis.

Because tribal considerations were not included in the development of HRS, nor in revisions to that system, there are pervasive deficiencies. Most of the deficiencies cannot be remedied without reopening the entire regulation, however, since the regulation is specific in the metrics and scoring. This means that the only accommodation of tribal concerns at present is within the definitions of some of the scoring terms and in the site narrative.

When applying the HRS at sites that affect tribal resources, the SWG recommends that EPA consider evaluating the number of tribal members using an affected resource as the "targets" in addition to counting residents and workers at a site. This will absorb the distance ring limitations calculated from the contamination source so that assessors can accurately integrate all the affected targets with uses of the contaminated resource(s). This way, subsistence activities can be considered on-site work where it occurs within the contaminated area being scored.

EPA should also characterize "sensitive" environments to include tribal hunting, gathering, fishing, other tribal cultural uses, and other tribal cultural resource areas because sensitive environments are accorded special scoring weight. Additionally, the SWG recommends that site narratives fully describe all the tribal resources and uses within the contaminated area (and the area that will be affected if the contamination spreads) to the extent possible, even where only one pathway (air, groundwater, surface water, soil) is used in the scoring process.

Finally, SWG recommends that EPA use tribal environmental standards in addition to national standards such as Maximum Contaminant Levels. Some tribes have established standards for contaminants, and these standards should be used when they are more protective than federal and other standards.

Deliberate and conscientious incorporation of tribal community concerns into risk assessment and risk communications will make decisions more stable and robust, not less scientific. The unique and distinct traditional lifeways of tribes are protected from infringement through tribal government. Federal protections have been formulated and are carried out through government-to-government dealings and resulting statutory modifications and Indian policy development. The federal trust responsibility and government-to-government dealings are the drivers for EPA environmental regulation of tribal resources. Consultation is the context for mutual cooperation and partnership.

Deliberate and conscientious incorporation of tribal community concerns into risk assessment and risk communications will make decisions more stable and robust.

Tribes and Funding

Tribal Superfund funding is necessary for tribal participation in Superfund planning processes. The tendency, however, has been to consider tribal concerns the same as "public" participation and to withhold funding. This attitude circumvents the intent of Congress and federal policy. Federal law and EPA policy view tribal governments as coregulators and natural resource trustees, in partnership with state and federal agencies.

While direct implementation of Superfund is likely not feasible for all of the tribes whose resources are potentially impacted, the meager amounts of tribal Superfund program funding are less than a million dollars annually since the 1986 Amendments. In comparison, EPA's Tribal Air Programs have reached $11 million annually in the 2004, 2005, and 2006 appropriations.

In the context of Superfund, as in most EPA programs, funding issues permeate tribal environmental protection needs. Consequently, SWG recommends that funding be provided to tribes and tribal experts for their participation in EPA advisory committees and review processes. Tribes often have to spend their own funds (and pay for the time of representatives attending meetings and reviewing documents with tribal funds) whereas EPA contractors are funded. This inequity should be rectified.

Between 2000 and 2002, EPA/OSWER selected Superfund Pilot Projects. One pilot project was funded that allowed a tribe to conduct its own sampling. Fish tissue samples were collected and prepared for analysis. Comparisons with sampling analysis conducted by a site's

responsible party were to be undertaken as well. The tribe submitted its analyses to EPA, which helped to compel additional sampling and testing and may eventually compel additional cleanup activity at an NPL site.

The Swinomish Tribe was awarded a research grant to focus on contamination of shellfish. This Tribe's lands are within five miles of several massive NPL sites in and around the City of Seattle. This research grant represents one of a number of studies proposed by some SWG tribes. Funding for other studies should be awarded so that tribal data can contribute to the body of science.

Unfortunately, pilot project funding and research studies simply cannot meet the needs of tribes to be assured of reliable and consistent Superfund participation. EPA and most states have entire staffs and even more support contractors—experienced and fully supported teams. Yet the state and federal agency officials and contractors are unlikely to introduce tribal resource protection considerations into the processes. State programs have benefited from federal funds through direct implementation agreements for over a decade. In contrast, federal funding for tribal programs is, in many instances, unreliable or otherwise intermittent. This means that unless a tribe is capable of devoting its own resources to a tribal CERCLA program, tribal participation will be irregular at best.

In the context of Superfund, as in most EPA programs, funding issues permeate tribal environmental protection needs.

Although EPA's tribal funding initiatives were short term, they were nevertheless significant. These initiatives led to SWG's recommendation that EPA and other agencies institute tribal earmark funding to support Superfund, risk assessment, and related activity. EPA's tribal Superfund program set-aside monies should be an amount not less than $3 million annually so that EPA provides direct and reliable funding support for tribal Superfund programs. Funding should be available without a requirement for matching funds. Other agencies and departments (e.g., agencies within the Departments of the Interior and Agriculture) should also institute tribal earmarks for litigation support, natural resource damage assessments, and related activities.

Tribes need funding agreements that are sufficient, reliable, and multiyear in duration. This can be accomplished through cooperative agreements, memoranda of understanding, or other mechanisms. Through cooperative agreements, tribes have been funded to research and otherwise investigate hazardous substance contamination to address the impacts on tribal resources and threats to health. Tribal funding agreements must not be subject to a competitive processes, however, such that tribes and/or states are pitted against each other for program funding.

SWG stresses that funds provided for tribal Superfund program activities need to be adequate for staff participation in all site documentation, including literature research, maintaining the administrative record, technical review, meetings, document development, and related items, and should be treated as cost-recoverable expenditures. Tribal program funding will also require appropriate and adequate data collection costs so that the tribes are able to conduct environmental sampling based on appropriate tribal resource uses, reference areas, and for background data purposes. Adequate funding support is crucial for full partnerships with tribes to be fulfilled.

It must also be noted that the issue of adequate funding for tribal Superfund activities must be addressed separately from issues relating to funding for tribal brownfields response programs, as authorized by Section 128 of CERCLA as amended. 42 U.S.C. § 9628. Brownfields are contaminated sites that are not so contaminated that they make it onto the NPL. Tribes, like states, are specifically eligible for funding for brownfields response programs.

When approaches and procedures are enhanced and supplemented as recommended here, results will include enhanced environmental protection for all. EPA recognizes that its responsibilities are improved by partnerships with those who are adversely affected. EPA actions to embrace and support meaningful tribal government participation in site investigations, risk assessments, and cleanup decisions will advance human health and environmental protections. EPA steps to provide funding and to institute risk assessment and restoration policies that incorporate tribal resource uses will produce positive benefits now and for the future.

EPA/OSWER has begun to take some steps to address shortcomings regarding tribal government roles in Superfund. In 2006, OSWER published its first strategy for including tribal programs in the Superfund processes. EPA/OSWER is preparing to release its Beginner's Guide for Working with Tribes at Superfund Sites. While such steps are being taken late in the game, there remains much work to be done under CERCLA. Twenty-six years after CERCLA was enacted, and twenty years after it was amended to treat tribes like states, contaminated sites still exist and uncontrolled releases still occur. Tribal governments must have opportunities to participate in cleanup and restoration decisions.

Indian Tribes and Project Development Outside Indian Reservations

Michael P. O'Connell

Indian tribes have become increasingly involved in project development outside Indian reservations. In some cases, tribes are project proponents. In other cases, tribes may seek to influence permits, other governmental approvals, and funding needed for project development. In still others, an entity interested in a project, such as a financing entity, may request due diligence on one or more tribal issues before committing resources to a project. This article provides an overview of tribal involvement in project development outside Indian reservations and identifies practice considerations related to the same. It begins with an overview of the federal trust responsibility and then describes procedural and substantive environmental review affording tribes opportunities to impact project decision making. Finally, the article addresses the role of tribes as project proponents.

Through treaties, acts of Congress, executive orders, and a course of dealing designed to open most Indian land and resources to non-Indian settlement, the United States assumed legal and moral obligations to protect Indian tribes in the occupation and use of small portions of their aboriginal lands and resources. Many but not all of the treaties and acts of Congress reserved to tribes certain off-reservation rights.

The resulting relationship between the United States and Indian tribes imposes fiduciary duties on the United States to fulfill its legal obligations to and to secure rights reserved by or for Indian tribes in treaties, laws, and executive orders. The resulting *federal trust responsibility* attaches to the federal government as a whole. *Parravano v. Babbitt*, 70 F.3d 539, 546 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996).

The precise nature and effect of the federal trust responsibility varies according to context and is complicated. *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §§ 5.04[4]–5.05[4][b] (2005 ed.). Through the Supremacy Clause of the U.S. Constitution, rights reserved by or for tribes in treaties, acts of Congress, and executive orders established pursuant to law are the supreme law of the land. Where treaties, acts of Congress, and executive orders do not mandate specific federal action, the federal trust responsibility provides a rationale for the exercise of discretion by federal agencies toward the goal of fulfilling in real-world terms tribal rights secured by treaties, laws, and executive orders. Thus, the federal trust responsibility is a looming presence over federal agency action potentially affecting tribal interests.

Despite the federal trust responsibility, federal agencies are not always aware on a project-by-project basis of either mandatory duties assumed by the United States under federal treaties, laws, and executive orders or the discretion they may exercise to fulfill tribal rights or to avoid, minimize, or mitigate adverse impacts of agency action on tribal interests. To enlighten federal agencies regarding these matters, Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67249 (Nov. 9, 2000) (published at 25 U.S.C. § 450 note), directs federal agencies to consult with Indian tribes on a government-to-government basis in the development and implementation of federal policies or actions that have tribal implications. A number of federal agencies, including independent commissions, have adopted similar policy statements and guidelines. *See* Federal Energy Regulatory Commission, 18 C.F.R. § 2.1(c). Those policies are implemented, in part, through procedural and substantive environmental review.

Procedural Environmental Review

The National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, and regulations adopted by the Council on Environmental Quality, 40 C.F.R. Parts 1500–1508, promote environmental quality by ensuring that federal agencies carefully consider information concerning significant environmental impacts of proposed actions before making decisions. The NEPA seeks to ensure that agency decisions are "well-informed" through, in part, the public comment process (in which tribes may participate). *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

Proposed federal actions, including issuance of permits, for activities outside Indian reservations may affect human health and natural and cultural resources on Indian reservations. Federal actions may also affect tribal off-reservation treaty fishing, hunting, food gathering rights, and other tribal interests outside Indian reservations. As appropriate, the NEPA requires federal agencies to evaluate effects of proposed federal agency actions on such tribal interests. Correspondingly, the NEPA affords Indian tribes an opportunity to comment on proposed federal actions.

Mr. O'Connell is a partner at Stoel Rives LLP in Seattle, Washington. He can be reached at moconnell@stoel.com.

The National Historic Preservation Act (NHPA), 16 U.S.C. § 470 et seq., and implementing regulations adopted by the Advisory Council on Historic Preservation (Advisory Council), 36 C.F.R. Part 800, are binding on all federal agencies. NHPA amendments enacted by Congress in 1992 and the Advisory Council's implementing regulations enhance the role of Indian tribes in consultations mandated by NHPA Section 106 for federal actions outside Indian reservations. 16 U.S.C. § 470f. Among other matters, the 1992 amendments provide that properties of traditional religious and cultural importance to Indian tribes may be eligible for listing on the National Register of Historic Places (National Register). 16 U.S.C. § 470a(d)(6)(A). Historic properties of religious and cultural importance to tribes include, but are not limited to, traditional cultural properties (TCPs). *See* National Park Service, National Register Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties (1998 ed.) (*available at* www.cr.nps.gov/nr/publications/bulletins/nrb38/). The relevant agency official must consult on a government-to-government basis with any Indian tribe which attaches religious or cultural importance to a TCP listed on, or eligible for, listing on the National Register that may be affected by an undertaking, regardless of location. 36 C.F.R. Part 800.2(c)(2)(ii).

Section 106 and the Advisory Council's regulations provide that a federal agency with direct or indirect jurisdiction over an "undertaking," including issuance of a license or permit or an expenditure of funds, must "take into account the effects of the undertaking" on properties listed on, or eligible for listing, on the National Register and afford the Advisory Council an opportunity to comment. The Advisory Council's regulations prescribe a rigorous consultation process. The responsible agency must make a reasonable good-faith effort to identify any Indian tribe that may attach religious or cultural importance to historic properties in the area of potential effects (APE) and invite such tribes to be consulting parties; gather information from such tribes which may assist in the identification of historic properties within the APE; notify such tribes of the agency's "no adverse effect" or "adverse effects" determination; consult with tribes on the assessment of potential adverse effects and measures to avoid, minimize, or mitigate any adverse effects; and notify consulting tribes, where applicable, of the action agency's decision to terminate the Section 106 process when there is a failure to resolve adverse effects.

A tribe's participation in these procedures is intended to, and can, have a powerful effect on an agency's decision whether and how to proceed with an "undertaking" outside an Indian reservation. In consideration of issues raised by a tribe, a federal agency could exercise discretion and impose conditions or other limitations on an undertaking not required by law.

A dramatic example of what can happen when these procedural steps are given short shrift is the Port Angeles Graving Dock Project, a major Washington State transportation project. Three years and more than $86 million into the Project, the Washington State Department of Washington abandoned the Project site. By then, more than 300 Indian skeletal remains had been excavated and a world-class historic Indian village was being unearthed. An audit and legislative report prepared in the wake of this debacle found an inadequate and hurried site investigation and Section 106 consultation, compounded by decisions to move the Project footprint without reinitiating cultural resource surveys and the Section 106 consultation.

Section 7(a)(2) of the Endangered Species Act (ESA), 16 U.S.C. § 1536(a)(2), directs each federal agency, in consultation with the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS), as appropriate, to ensure that any action authorized, funded, or carried out by that agency is not likely to jeopardize the continued existence of any listed endangered or threatened species or to destroy or adversely modify the critical habitat of such species. *See* 50 C.F.R. Part 402.

In 1997, the Secretaries of the Interior and Commerce, on behalf of FWS and NMFS respectively, issued Secretarial Order 3206, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (Secretarial Order)(*available at* www.fws.gov/endangered/tribal/index.html). The purpose of the Secretarial Order was to clarify responsibilities of the Departments when their ESA actions "affect or may affect Indian land, trust resources, or the exercise of American Indian tribal rights." The Secretarial Order states that the Departments will carry out their ESA responsibilities in a manner that harmonizes the federal trust responsibility to tribes, tribal sovereignty, and statutory missions of the Departments and that strives to ensure that Indian tribes do not bear a disproportionate burden of the conservation of listed species. "Principle 1" of the Secretarial Order directs FWS and NMFS to consult with tribes whenever they are aware that their proposed actions under the ESA "may impact tribal trust resources, the exercise of tribal rights, or Indian lands." When FWS and NMFS enter formal Section 7 consultations with agencies outside the Departments, the Secretarial Order provides that FWS or NMFS will notify affected Indian tribes and encourage the action agency to invite affected tribe(s) to participate in the consultation process.

The Secretarial Order ensures that FWS, NMFS, and other federal agencies, as well as parties seeking federal permits or funding, take into account potential effects of such actions and related conservation measures under the ESA on tribal rights and claims. The requirement that action agencies as well as FWS and NMFS use the best scientific and commercial data available in consultations provides incentives for agencies to fairly consider information submitted by tribes in connection with such consul-

tations. While tribes do not have a veto power over consultations, the Secretarial Order brings into focus the need to properly consider the effects of agency actions triggering the ESA on tribal rights and claims.

Section 401 of the Clean Water Act (CWA), 33 U.S.C. § 1341, provides that any applicant for a federal license or permit to conduct an activity that may result in a discharge to waters regulated under the Act shall provide the licensing or permitting agency a water quality certification from the state or tribe that has EPA-approved water quality standards where the discharge will occur. No license or permit may be granted by a federal agency until the certification is granted or waived.

Section 401 requires states and tribes with EPA-approved water quality standards to provide interested parties notice and an opportunity to comment on certification applications. A tribe's challenge to a state's water quality certification, such as an alleged failure to adequately protect water quality for fish habitat, ordinarily must be brought in accordance with procedures and forums established by state law. *Confederated Tribes of the Umatilla Reservation v. Department of Ecology*, Washington Pollution Control Hearings Board No. 03-075 (April 21, 2004) (amending, and, as amended, upholding certification). If the question is whether the state agency complied with the requirements of Section 401, for example, by issuing a certification without complying with the public notice requirements of Section 401, the federal permit or license-issuing agency can review that much of the certification provided by a state. *City of Tacoma v. FERC*, 460 F.3d 53 (D.C. Cir 2006).

Last but not least, states may include conditions in their certifications. Under Section 401(d), the federal permit or license-issuing agency must include those conditions as terms and conditions in any permit or license issued by the federal agency. Tribes can urge states to include such conditions in a certification.

Under the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1456(c)(3)(A), an applicant for a federal license or permit to conduct an activity affecting any land or water use or natural resources of a state's coastal zone must provide in the application for that federal license or permit a certification that the proposed activity complies with the state's approved coastal zone program and that the activity will be conducted consistent with that program. If the state objects, the federal agency cannot issue the federal license or permit, except in certain cases where an appeal may be taken to the Secretary of Commerce. If a state fails to object within six months from receipt of a consistency certification (with all necessary information and data), its concurrence is conclusively presumed.

Like Section 401, the CZMA requires a state to provide interested parties notice of, and opportunity to comment on, the state's action on a consistency certification. A tribe whose members have a right to take anadromous fish may provide comments to the state agency considering a consistency certification regarding effects of the proposed action on such fish. *Skokomish Indian Tribe v. Fitzsimmons*, 982 P.2d 1179 (Wash. App. 1999) (holding arbitrary and capricious the Department of Ecology's failure to object to a project it acknowledged was inconsistent with the state's program).

"No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights."

Apart from federal procedural obligations, California, Washington, and several other states have enacted laws similar to NEPA. *E.g.*, California Environmental Quality Act, Public Resources Code § 21000 et seq. These laws establish procedures for environmental review of proposed state and local government actions. Members of the public, including tribal interests, are entitled to notice of and opportunity to comment on such actions and to seek administrative and judicial review of state and local compliance with state NEPA-type laws. *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 860 P.3d 390 (Wash. 1994). Through these federal and state procedural environmental review statutes, tribes and tribal members can have a substantial impact on project development outside Indian reservations.

Substantive Environmental Laws

There are a number of substantive environmental requirements that give Native Americans additional means to affect project development. When a state with an EPA-approved National Pollutant Discharge Elimination System (NPDES) program issued a draft NPDES permit, the state must provide a copy of the draft permit to EPA and any other state, including an Indian tribe treated as a state under Section 518 of the CWA, 33 U.S.C. § 1377, whose waters may be affected by issuance of the permit, among others. 33 U.S.C. § 1342(b). EPA may object to a draft state NPDES permit if it would cause a violation of a downstream state or Indian tribe's EPA-approved water quality standards. *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996),

cert. denied, 522 U.S. 965 (1997).

A state must also provide public notice and an opportunity for a hearing on all draft permits before taking final action. A state must provide such notice to any affected tribe, even if the tribe is not treated as a state under Section 518, as well as to FWS and NMFS. 40 C.F.R. § 124.10(c)(iii) and (iv). A tribe with off-reservation treaty fishing rights may comment to the state NPDES permit authority regarding effects of a proposed discharge on fish or tribal members who may consume such fish. Where endangered or threatened species may be affected by a discharge, FWS or NMFS may provide comments reflecting the Secretarial Order for coordinating their responsibilities under the ESA with the federal trust responsibilities to Indian tribes. A state must respond to such comments. 40 C.F.R. § 124.17. Thus, although states are not required to consult with FWS and NMFS under Section 7 of the ESA when issuing NPDES permits, the administrative record upon which a state makes its final NPDES permit decision may well include comments and responses reflecting not only tribal interests but federal efforts to carry out the federal trust responsibility.

In states where EPA is the NPDES-permitting authority, EPA consults with interested tribes when it is developing a permit, consistent with Executive Order 13175 and EPA's 1984 Policy for the Administration of Environmental Programs on Indian Reservation (*available at* www.epa.gov/indian/1984.htm). Under Section 7 of the ESA, EPA must also consult with FWS or NMFS, as appropriate, if listed species or their habitats may be affected by proposed discharges. In turn, under the Secretarial Order, FWS and NMFS may consult with tribes regarding impacts of an EPA NPDES permit on listed species or their habitats which a tribe has a right to take under a treaty, law, or executive order.

The U.S. Army Corps of Engineers (Corps) issues permits for the discharge of dredged or fill material into navigable waters under Section 404 of the CWA, 33 U.S.C. § 1344, and permits for obstruction of navigable waters under Section 10 of the 1899 Rivers and Harbors Act, 33 U.S.C. § 403. Several cases illustrate the substantive effect that Indian treaty rights may have on the Corps's authority to issue permits for off-reservation projects. In a challenge by the Muckleshoot Indian Tribe to a Section 404 permit authorizing marina construction, the federal district court found that the Corps acted unlawfully in granting a permit that would preclude tribal member access to treaty-reserved usual and accustomed fishing grounds and stations. *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504 (W.D. Wash. 1988). In *Northwest Sea Farms, Inc. v. United States Army Corps of Engineers*, 931 F. Supp. 1515 (W.D. Wash. 1996), the same federal district court upheld the Corps's decision to disapprove an application for a Section 10 permit to anchor a floating fish pen in Puget Sound after determining the fish pens would have interfered with Lummi Indian access to usual and accustomed fishing grounds or stations reserved by treaty. Finally, in a case not involving Section 404 or 10, the Corps sought to construct a dam that would have inundated treaty-protected usual and accustomed fishing grounds and stations. The U.S. District Court for the District of Oregon effectively blocked the Corps from doing so in a declaratory order after finding that the Corps did not have Congressional authorization to destroy access to treaty-reserved usual and accustomed fishing sites. *Confederated Tribes of the Umatilla Indian Reservation v. Alexander*, 440 F. Supp. 553 (D. Or. 1977).

Where Indian human remains or cultural items are inadvertently discovered during implementation of a project on federal lands, activities in the area of the discovery must cease.

The sum of these cases is reflected in National Condition No. 8 for the Corps's Sections 404 and 10 Nationwide Permits, which the Corps has proposed to reissue, without other change, as National Condition No. 16. *See* 71 Fed. Reg. 56,258, 56,294 (Sept. 26, 2006). Captioned "Tribal Rights," this National Condition provides: "No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights." Whether seeking authorization under an individual permit, general permit, or letter of permission, project proponents should carefully assess potential impacts of any activity authorized by the Corps on tribal rights and interests. Direct dialogue between the project proponent and affected tribes may be necessary to identify measures that address the point made by National Condition No. 8.

Section 303 of the CWA requires states to review and, as appropriate, adopt revised water quality standards every three years, subject to EPA approval. Tribes, FWS, and NMFS frequently provide recommendations to states regarding proposed revisions to state water quality standards before and during this review process. As part of its review, EPA consults with tribes as well as FWS and NMFS. If EPA disapproves a state's revised standards, the state must further revise its standards to meet EPA's requirements or EPA must promulgate federal standards. The more stringent state water quality standards that may

emerge from this process form, in turn, the basis for more stringent NPDES permit terms and conditions in new and renewed NPDES permits. Tribal participation in the triennial review process can, therefore, have significant impacts on projects located outside Indian reservations.

In addition to the states, about thirty tribes have EPA-adopted water quality standards. *See* 40 C.F.R. § 131.9. A tribe's water quality standards may be more stringent than those adopted by an upstream state or tribe on the same body of water. Subsections 402(b)(5) and (d) of the CWA establish that NPDES permits issued by an upstream permitting authority must be conditioned so as not to cause violations of such downstream tribal water quality standards. Thus, tribal water quality standards adopted for waters on a reservation can have substantial implications for permitted discharges outside an Indian reservation.

In 1908, the U.S. Supreme Court held that implied water rights exist for an Indian reservation. *Winters v. United States*, 207 U.S. 564 (1908). With limited exceptions, tribal reserved water rights have a priority date senior to all other users from the same source. During periods of water shortage, those holding water rights with junior priority may be required to reduce their water use to the extent necessary to allow senior rights to be satisfied.

Some Indian water rights have been quantified in general stream adjudications or by congressionally approved water settlements, creating greater predictability and in some cases flexibility regarding use of tribal and nontribal water rights. Congressionally approved Indian water settlements often provide funding needed for new tribal and non-Indian water projects.

Where Indian water rights are not quantified, or treaty rights are asserted in a manner that would effectively limit non-Indian use of water, bilateral or multiparty negotiations involving Indian tribes, with or without mitigation measures, may provide nontribal project proponents enough information and certainty to make informed, risk-based determinations regarding long-term plans and investments for use of water. Illustrative is the 2006 Cedar River Settlement Agreement between the City of Seattle and the Muckleshoot Indian Tribe. The agreement secures the city's long-term water supply while resolving the Tribe's claims for sufficient flows to protect fish, which tribal members have treaty rights to take. Congress and states can also provide funding and institutional mechanisms to resolve complex water issues involving tribes on and outside Indian reservations. *See* Yakima River Basin Water Enhancement Project, Title XII, Pub. L. No. 103-434.

On federal lands, intentional excavation or removal of Indian human remains or cultural items is authorized *only* with a permit issued under the Archaeological Resources Protection Act. 16 U.S.C. § 470cc; 43 C.F.R. Part 7. Before issuing such a permit, the federal land manager must consult with designated Indian tribes. Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3002(c); 43 C.F.R. §§ 10.3 and 10.5.

Where Indian human remains or cultural items are inadvertently discovered during implementation of a project on federal lands, activities in the area of the discovery must cease, a reasonable effort must be made to protect the discovered items, and immediate telephone notice must be given, followed by written confirmation, to the responsible federal land manager. 25 U.S.C. § 3002(d); 43 C.F.R. § 10.4. The federal land manager must notify and consult with certain Indian tribes. If the Indian human remains or cultural items must be removed, the permit and procedures for intentional excavations and removals are applicable. Subject to the foregoing, the activity that resulted in the inadvertent discovery may resume thirty days after certification by the federal land manager of receipt of the written notice required for such discoveries.

Many states prohibit or otherwise regulate disturbance or removal of any Indian graves without a permit or other authorization. Such statutes typically provide for consultation with interested tribes. *E.g.*, Washington's Indian Graves and Records Act, WASH. REV. CODE § 27.44. Unauthorized removals may be punishable as a crime and may give rise to civil liability for general damages, punitive damages, and attorney fees in an action by a tribe affiliated with the remains. Some states also expressly authorize a civil action in state or tribal court for emotional distress by tribal members of a tribe affiliated with human remains unlawfully removed.

Many states also regulate disturbance, damage to, or removal of archaeological and historic resources on nonfederal lands. *E.g.*, Washington's Archaeological Sites and Resources Protection Act, WASH. REV. CODE 27.44. Some states do not require a project proponent to obtain a state permit where the activity causing such impacts is the subject of a completed NHPA Section 106 consultation. State procedures typically provide for notice to potentially interested tribes.

Tribes as Project Proponents

An Indian tribe may identify land outside a reservation it would like to acquire for purposes such as siting a new project, holding for investment purposes, or maintaining existing operations. Sale, lease, or other conveyance of that land to third parties may also be associated with an off-reservation tribal project. These plans warrant consideration in light of historic statutory restraints on the conveyance of interests in tribal land. In 1834, Congress enacted a law (codified at 25 U.S.C. § 177) that provides, in part: "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered pursuant to the Constitution."

The breadth of Section 177 has been the subject of recent focus. An amicus curiae brief filed by the Solicitor General in *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998), asserts that Section 177 applies to land owned by Indian tribes in fee simple outside, as well as within, Indian reservations. Additionally, Congress on

occasion has expressly authorized the sale, lease, or other conveyance of tribal fee land, underscoring uncertainty whether such authorization is necessary. *See* 25 U.S.C. § 635(b) (authorizing Navajo Nation to sell, lease, or otherwise convey land it owns in fee simple). Absent clarifying congressional or judicial action, tribes contemplating acquisition of fee land and third parties working with a tribe may wish to consider strategies to avoid or reduce the uncertainty created by Section 177. One such strategy might involve acquisition of the land by a business corporation or other entity that is not an arm or instrumentality of the tribe.

The implementation of tax laws is also unique with respect to Indian tribes and tribal interests. The Internal Revenue Service has determined that Indian tribes and tribal government corporations chartered under Section 17 of the Indian Reorganization Act, 25 U.S.C. § 477, are not subject to the federal income tax. This is so even when a tribe or Section 17 corporation earns income outside a reservation. In contrast, persons who do business with a tribe do not share this tax treatment. Outside a reservation, a tribe is subject to applicable state and local taxes, absent a federal law or treaty to the contrary. Nonetheless, a state or local tax law may be so written that it does not apply by its terms to a tribe, property of an Indian tribe, or a business transaction in which an Indian tribe is engaged. Those engaged in business transactions with tribes outside reservations are subject to applicable federal, state, and local taxes.

Due diligence is necessary to determine which entities have sovereign immunity and how such immunity may be validly waived.

The United States may take land outside a reservation into trust for a tribe. 25 U.S.C. § 465; 25 C.F.R. Part 151. Land so acquired is exempt from state and local taxation. A Bureau of Indian Affairs regulation provides, except as adopted by the Secretary of the Interior, that "none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning, or otherwise governing, regulating, or controlling the use or development" of land shall be applicable to any "property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States." 25 C.F.R. § 1.4.

Finally, jurisdiction over Indian tribes and disputes is also distinct and warrants specific consideration. As a matter of federal law, Indian tribes have sovereign immunity in all courts, absent express consent by Congress or the tribes themselves. This immunity applies outside Indian reservations and is not waived by entering into contracts, owning land, or engaging in business transactions. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998). However, an Indian tribe's agreement to arbitrate disputes, where the arbitration clause includes a provision for judicial enforcement, waives tribal sovereign immunity to the extent of matters governed by the arbitration clause. *C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001).

Indian tribes engage in business transactions through many different entities, such as business corporations, tribal government corporations chartered under tribal law, limited liability companies, Section 17 corporations, nonprofit corporations, and enterprises or authorities established under tribal law. Some of these entities do not have sovereign immunity. Of those entities which do, that immunity may have been waived in an entity's charter or the entity may be authorized to waive its immunity on a limited, case-by-case basis. Due diligence is necessary to determine which entities have sovereign immunity and how such immunity may be validly waived.

With respect to causes of action arising outside Indian reservations, state courts may have jurisdiction over suits by or against Indian tribes. *Navajo Nation v. MacDonald*, 885 P.2d 1104 (Ariz. App. 1994). Because some transactions with an Indian tribe may involve events occurring both on and outside a reservation, state and tribal courts may have concurrent jurisdiction. Moreover, even where a business transaction involving an Indian tribe occurs outside an Indian reservation, some questions may be controlled solely by tribal law. For example, an agreement may be executed by a tribal official. Whether that official was authorized to execute the agreement on behalf of a tribe may be governed by tribal law. A tribal court may be the only forum with authority to determine that issue conclusively.

Finally, the mere fact that an Indian tribe is a party to a contract does not create federal question jurisdiction. *Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 1232 (9th Cir. 1980), *cert. denied*, 451 U.S. 911 (1981). A tribe's arbitration agreement does not create federal question jurisdiction to enforce an arbitration agreement or award. *Peabody Coal Co. v. Navajo Nation*, 373 F.3d 945 (9th Cir. 2004), *cert. denied*, 543 U.S. 1054 (2005). An Indian tribe is not a citizen of any state for diversity jurisdiction purposes. *American Vantage Companies, Inc. v. Table Mountain Rancheria*, 292 F.3d 1091 (9th Cir. 2002).

In conclusion, Indian tribes and those engaged in business transactions with tribes outside a reservation are subject to applicable state and local laws, in addition to federal laws and regulations. Whether a state or local law or regulation is applicable nonetheless requires focus on terms of the law or regulation, the entity or person regulated, and the subject or activity regulated.

Interview

Rick West

By Milo Mason and Dean Suagee

W. Richard West Jr., a citizen of the Cheyenne and Arapaho Tribes of Oklahoma and a Peace Chief of the Southern Cheyenne, is founding director of the Smithsonian's National Museum of the American Indian. Before becoming director of the National Museum of the American Indian, West practiced law at the Indian-owned Albuquerque, New Mexico, law firm of Gover, Stetson, Williams & West, P.C. and before that, he was a partner in the Washington, D.C., office of Fried, Frank, Harris, Shriver & Jacobson. West, who grew up in Muskogee, Oklahoma, was the son of American Indian master artist, the late Walter Richard West Sr., and Maribelle McCrea West. He earned a bachelor's degree (major in American history) magna cum laude and graduated Phi Beta Kappa from the University of Redlands in California, received a master's degree in American history from Harvard University, and graduated from the Stanford University School of Law. NR&E *sat down with him in his office overlooking the National Mall and the nation's Capitol.*

NR&E: On behalf of the editorial board of the *Natural Resources & Environment* magazine of the ABA Section of Environment, Energy, and Resources, we thank you for this interview.

Rick West: Thank you. I'm happy to do it.

NR&E: Tell us how this museum came about.

West: This museum, the National Museum of the American Indian, was a happy confluence of several events. One of them is a very big picture. I think in the early 1990s America was ready for this museum in terms of reconciling itself to its own history. And that's a very big picture kind of thing when you think of it. Native people were known, but known only in certain ways historically. The fact that they had been a major influence, that they continue to exist as peoples of the present was not very well known to the public. Somehow in 1990 America was ready to rethink all of that.

The second factor was that a very great collection, probably the greatest collection and assemblage of the cultural patrimony of native people throughout this hemisphere, not just the United States, was in jeopardy. The foundation which held it in New York was literally about to break up over finances. The chances were that this collection would be dispersed and a great collection broken up. So, it was the coming together of these two things and their resolution through the Smithsonian and with Congress that created this place.

It wasn't just a conventional museum that ever was thought up by anybody (the Congress or the Smithsonian). The notion was that this museum would be far more a creation of a collaboration between native peoples and others. It was a bit of a new concept, at least on this scale at the time. Not that other museums had not done that; it had been done but not a national museum sitting on the Mall.

NR&E: I hesitated to call it a museum.

West: It's not.

NR&E: Its labeled a museum.

West: What it is really, if you are trying to get the largest functional title of the place, would be an interna-

tional institution of living cultures. Now that implies the kind of interactivity that we're talking about. It also implies rather strongly—in fact it may not be implicit, it may be explicit—that it is not simply an ethnographic museum. It is of living cultures, and living cultures include not only material culture, but it is about the people who make the material culture through time—past to present... and the communities in which these peoples and these cultures sit. This is an international institution of living cultures. I would describe it more accurately as a cultural center rather than as a museum.

NR&E: The interactiveness is oral and visual . . . not just objects. It's living, and you capture that in both the displays and the center.

West: Right, we're not just displays. This isn't just a hall of exhibitions about collections. This is, of course, exhibitions because that's one of the principal media, if you will, of a museum. But as an international institution of living cultures, it has to do with both process and substance. The process of how you make an institution like this work is having a collaborative, mutual, and participatory relationship with the constituents of the museum. We have lots of audiences, but our constituents are native peoples. And you have to have this kind of collaboration and participatory relationship with them. That's the process of it. The substance of it is that it takes on a totally different cast. This is not just a palace of collections. It's about people; it's about the communities; it's about their past; it's about their present. It's about the process of creating and maintaining culture—that's a substance also. That's different. And it's thrown a couple of people who've walked through these doors for a bit of a loop because they expect a very conventional kind of presentation of collections. You know, where's the beautiful stuff? Where are the iconic objects? I understand that. I'm the son of an artist. But it is not what this place is about.

NR&E: Why is this place important to Americans?

West: I think this place is important to Americans because it reflects a piece of the shared cultural heritage of the Americas—again, not just the United States. It is absolutely fundamental. We weren't discovered. We were here. And I think what the museum, the international institute of living cultures, is about is trying to demonstrate to people why all of us have a stake and a reference point in this heritage.

NR&E: Why is it important to Native Americans?

West: I think it's important to Native Americans for a whole variety of reasons. The first is that so much of their material is in this place. But it's more than that. It's not just that their collections are here. It is important to Native Americans also because it is an opportunity, unprecedented, within site of that large dome sitting over there [Ed. Note: the nation's Capitol Dome] . . . to articulate ourselves right in the center of it all, if you will, at the head of the National Mall, sitting across from the National Gallery, which, of course, is the apotheosis of Western civilization as we know it here in America. And yet directly across from that is probably the most powerfully symbolic reference to those who were already here when those good folks came. It's that kind of historical importance.

NR&E: Why is it a North American museum and not just a U.S. Native American museum?

West: Well, it's not even just a North American museum. It's also Latin America. It's hemispheric; it's Panama Canal and south. There are two reasons for that. One is the collection itself. Thirty percent of our material is from Latin America and 3 percent of it is from Canada. It's not all just from the United States. That's one point. And museums of course are influenced by the collections they hold and how they define themselves by reference to those collections. But perhaps even more important is this: The political boundaries in this hemisphere are not ours; they're somebody else's. And the cultural axis for native peoples in this hemisphere is north south, not east west. And so it is difficult for me to think of talking about native peoples, native culture, and their cultural patrimony by any reference other than one which goes all the way from the north to the south because that was the extent of our occupation in those hemispheres.

NR&E: What was your role? I've read articles about how crucial you were in putting this together successfully and preventing warring factions and potential stalemates and funding shortfalls, and so on. And are the accolades true? Don't be modest. There's the great men theory of history: One person can and does make much or all the difference sometimes. . . .

West: Now don't take that too far. First of all, we actually will never know the real answer to that question because I'm the only person who's had the job. So we won't know whether somebody else could have done it even better than anybody might say that I have (because I'm the only one who's been here). But what I will say is this. It's a complex project. There's no question about that. But I, in my lawyerly fashion prior to my coming here, did a fair amount of due diligence.

The first thing was to determine whether Congress was really ready to support this project. You only had to have one meeting to determine that. And that was to meet with Senator Daniel Inouye from Hawaii. Then I knew that we had angels that mattered on the Hill. And he has stuck with us the entire time; we wouldn't be here were it not for him and with a great deal of help also from Ben Nighthorse Campbell. Second, I wanted to be sure that the Smithsonian was willing to take this project on in the terms that you and I have just described. Secretary Adams, the first secretary under whom I served, is probably one of the most brilliant intellects I have ever been around and an anthropologist, actually—not of the Americas, but of the Middle East. He assured me that the conception of the museum that sat in my mind—which was this international institution of living cultures—was very much his own too. The third piece of the puzzle was Native America. And I figured from the beginning that's why they were hiring

me—to try to see it get done right with as little gratuitous difficulty as possible. I was blessed even in that journey from the very beginning. I remember being taken aside by a good friend of mine, Oren Lyons from the Iroquois community in the northeast part of the United States (he's from Onondaga himself) and being told a couple of things. The first one was his general observation that this museum, potentially, was one of the best things to ever happen to Native America. He felt that he and others would do their level best to keep me out of the political crosshairs or safe from unnecessary political difficulty. And that happened. Second, he said that he would give us the breathing space to try to straighten out repatriation, which was a major issue for me coming into this. So my real point is that we were blessed with a very benevolent spirit from the native community itself. I would never characterize, frankly, Native America's connection with the development of this museum as being anything approaching warring factions. Native America, I think because we signaled very quickly that we expected this to be a collaborative enterprise, was with us. We're not divine; we're only human, and we make mistakes. But I think that Native America continues to believe that we do our level best to act consistently with that mode of collaboration and mutual participation that we signaled back in 1990.

NR&E: Speaking of that collaborative approach, what about the Cultural Resources Center in Suitland?

West: The National Museum of the American Indian is, of course, about three wonderful physical places in Washington, D.C., and New York—the George Gustav Heye Center in New York, the museum building here on the National Mall, and the Cultural Resources Center down in Suitland, Maryland. But it's always been kind of driven by ideas, if you will, and the connectivity between these physical places and Indian country. And to those physical places, I would add, which is a fundamental conception for the National Museum of the American Indian, what we call the fourth museum. The fourth museum is not a physical place. The fourth museum is bringing the National Museum of the American Indian to Native America. That is something that is terribly, terribly important to me, because I wouldn't be sitting here right now unless I had believed at the beginning that the National Museum is capable of doing that. Because I feel the National Museum of the American Indian has an overriding responsibility—indeed an obligation—to support cultural continuance in contemporary native communities. Unless we have the capacity and ability to deploy our resources—financial, human, and cultural—to that end, then we're not fulfilling a fundamental piece of our mission. The Cultural Resources Center is one of the places in which that connection with native communities takes place.

These are living collections. These aren't simply objects placed on a shelf. These objects continue to have relevance to living people. So we have sought from the very beginning to reestablish those connections between people and collections that are central to the mission of the National Museum of the American Indian.

NR&E: So Suitland and the New York office existed before this museum?

West: They did. In fact, I'm amused sometimes because people who don't know more about the museum will say: "You know, this is great to have this here on the Mall, but why did it take you fourteen years to do this?" Well, what they don't realize is that we opened the GGHC in New York in 1994; we opened the Cultural Resources Center in 1999. This is actually the capstone of a capital building project of the National Museum of the Native American.

NR&E: Going back to my earlier question about your role, what were the biggest challenges you faced?

West: I have two that come to mind. First of all, overseeing the financing of this project. That was a challenge, and it changed as we went forward.

Originally, this building was to cost $110 million and we were to raise $37.6 million or $36.7 million in connection with that. It ended up costing $220 million or about twice the original estimate. We had to raise almost $100 million privately to get this up on the Mall. So the challenges of garnering from Congress about half a billion dollars in both capital and operating funds over a period of a decade were considerable. But I came from a background situated right here in Washington, where I had been a registered lobbyist for the tribes and Indian organizations I had represented, so that place was not foreign territory and that indeed was helpful. I mean, when you have a project like this, of course you're going to have to raise lots of money, and of course it's always complicated.

NR&E: And of course there are going to be rising costs over ten or twenty years. . . .

West: Yes. Money just doesn't fall out of the sky. You have to go out and get it.

The more painful issue for me personally and even institutionally was that which surrounded the architecture of this building. And that is to say that we hired a brilliant architectural team that (long story short—there's no reason to go into detail) in certain respects didn't work out in the long run. So we had to basically shift architectural teams in the middle of the construction of this building. That was not easy. It had a painful, personal dimension to me because I knew the people and highly respected the people involved in that original architectural team. But because of my reading of the progress that had to be made in this project and our political accountability to the people sitting up there on the Hill, we had to do it differently. That shifting at this location was very, very difficult and very painful.

For me, this project has always had a certain inevitability to it; it really has. I mean, it was so big and so large a project, and they brought in this bloke who is a lawyer, not a museum person, to try to run it and direct it from the beginning. How could it help but kind of fall on its own face, if you will, of its own weight? But I never

believed that. The only time I even got close to that, or acquiescing in that, were the dog days of the architecture controversy. I remember my dad was still alive then. About ten years ago, I remember going to him mildly weepy and very whiny, and saying we've been here for six years and we've got into this stage . . . maybe I'll just take a walk. And my dad said, "You're going to take a walk right back into your office and you're going to sit down at that desk and you're going to get this done because this will get done, and I don't want to hear anymore about it."

NR&E: Part of the mission of the museum is to present tribal American Indians and tribal cultures to the larger American public. Tribal cultures are rooted in particular places, that manifest in material cultures, which is some of what is shown here in the museum. I'm wondering if you can think of one or two examples of particular cultures that really bolster that.

West: There are particular examples even right now sitting down on the floor. For example, if you go look at the Yakama exhibit in Our Lives and the Tapirapé, in Our People, you will see lots of references to the importance of place even when you're talking about urban populations in Chicago. Place always matters. But to the extent that it relates to environment, what's important to understand is not just environment from a purely ethnological or ethnographic context in that they lived in forests or they made baskets from cedar or something. It's a much bigger picture than that. I think what is fair to say, without any kind of overromanticization, is that native people sit in reference to physical environment in a way that affects not only what they make their objects out of but how they live their life because they have a cosmic view, if you will, of life, and the value of life and the origins of life that go much beyond their own—and much beyond two-legged and four-legged. It has much to do with plants that surround them and life that they even attribute to stones for that matter. It's this kind of thing that I think is important in defining first why it is that native people attach such importance to place. And second, why it is that contemporary native communities pay so much attention to it right now.

NR&E: And this building, this display, this cultural center tries to capture that and show it.

West: It does, but let me extend that just a little bit. The Gwich'in, which are a Native community that is in both Canada and the United States (northwest Canada and northeast Alaska)—set up camp right across Maryland Avenue from us about two years ago in connection with unwanted legislation—just in that little triangle piece of land over there. I always found that remarkable. And I find it remarkable in these ways. We didn't even invite them to come here; they felt they should come here because of the kind of place this is. They felt that this was an institution which was open to the expression and discussion of those kinds of concerns. The fact is that when you think of it . . . the National Museum of the American Indian, this international center of living cultures . . . when you think it is the creation not just of cultural destination . . . a tour, a stop on the tour bus route. This is civic space. This is civic space in which a variety of issues relating to native people can be discussed just as they're discussed on the floor just north of us in Congress. This is a forum in that way.

NR&E: It becomes a focal point.

West: It does, and it makes it the cultural center that I was talking about earlier. It takes it beyond conventional definitions of what museums do and how they act.

NR&E: Does it have an educational agenda?

West: It does.

NR&E: A political agenda?

West: I wouldn't describe it in political terms. I would say that all culture involves politics. There's no doubt about that. That's an aspect of culture. But, it is looking at culture fully read, and that means that it has impact upon the exhibits and what we have in the exhibits; it has impact upon public programming that goes beyond exhibits. Symposia are held here, and conferences are held here, lecture series that even provoke discussion about these kinds of issues. Knowing that the Gwich'in are likely to show up or somebody just like them right around this museum because they see this as a forum in which those kinds of issues get taken up. That's the big picture of what the National Museum of the American Indian is all about. And even more specifically, it is the future context of it because that's what this museum will do in the twenty-first century. Frankly, I think that's what many other museums will begin doing in the twenty-first century, too. This is not just us; this isn't just an ethnic question. This is a question about what museums do.

NR&E: So what you're saying is that this may become the template for all future museums.

West: I'm always careful to say it's not the destination for everywhere, for every museum. But I think it is a template, and what's interesting is that tribal community museums have been doing this for years if you look at them closely. They've had this approach for a long time, but they're rarely called museums. They're community and cultural centers. My view is to just think of this as being a community museum that happens to sit on the National Mall and be part of the Smithsonian Institution. That's the way I see this place actually.

NR&E: I see a possible outcome of that approach is helping the larger American society get comfortable with the idea of Indian tribes as governments that run environmental protection programs.

West: Sure.

NR&E: Because of the importance of natural resources to the tribal cultures, tribes have stepped up and run governmental programs to manage natural resources and protect the environment. Can the museum help people in the larger society get comfortable with that?

West: I understand that. And we aspire to that in various ways. Frankly the 1.5 to 2 million people who walk through those doors every year are nonnative; although

we have a shockingly large percentage who are native...totally out of proportion to the percentage of native people in the general population. The fact is that the aspiration of the National Museum of the American Indian in those terms that you described is that it become a place of civic engagement—conversation—even controversy sometimes—about how it is that we discuss these issues and become reconciled.

Let me give you a specific example. We will be doing an exhibit probably a couple years down the road that we call as the working title simply "the treaty exhibit." We're working with Suzan Harjo very closely and our public program people. One could look at that as a display and exhibition of precious documents, many of which will be loaned to us by the National Archives, and that's wonderful. But you know that's not what it's about. It's really about so much more than that, and it goes to using those objects, to create the context for conducting precisely the kinds of discussions that you're talking about. And conducting a discussion that addresses those subjects not as some distant piece of history in the United States—it is that.

NR&E: We honor these old promises because they are promises we made, but we also honor these old promises because there are living people, living communities that depend upon these promises.

West: That's absolutely right. Statistics alone bear that out. There are hundreds of challenged but functioning native communities throughout this hemisphere right now. There are 35 to 40 million people who are natives. There are about 1 million plus in Canada. 2 million to 3 million here in the United States. In Latin America, I'm talking about 30 to 35 million of those who are native, I'm not talking about Mestizos, who do have native blood. I'm talking about those who are still native in terms of cultural aspiration. That's a huge thing when you think of it in terms of community and numbers of cultures represented and numbers of people represented. The point is to make that story more explicable to the millions of people who float through these doors every year, let alone those who become connected with that fourth museum that we talked about, which is the virtual existence of this museum that goes out all kinds of places and that increases our audiences by tens of millions every year. That's what this is about, too.

NR&E: So the museum's agenda is more educational—understanding what's going on here and now as well as what has happened in the past.

West: Absolutely.

NR&E: And it has a spillover of educating folks to know that Indians and their tribal governments can do things of a political nature that somebody wants them to do and they want to do.

West: Yes, and I would raise it above or beyond the term *spillover*. I think that that is a fundamental characteristic of contemporary native communities, certainly here in the United States, somewhat in Canada, and less defined in Latin America because of the relationship that governments have had with native communities down there. But see, that's all kind of put on the table for discussion when you're talking about the pieces of history that we're addressing.

NR&E: Has the museum had any involvement to date in helping tribes project their concerns about places; for example, using the National Historic Preservation Act process to protect places that have cultural importance outside of reservation boundaries?

West: The museum does not do that directly, but we act in collaboration and in support of efforts like that because there is an association with place regarding much of our even immediate work. I have been asked to be, and I have been, supportive as a collaborator, not as the main actor, but as a collaborator in supporting efforts of people to protect place, because in protecting place, we protect both people and material culture, and that's why it's important to protect place.

NR&E: Your views on territorial sovereignty—say, native Hawaiians—do they need territorial sovereignty to keep and perpetuate their culture rather than its being dissipated?

West: Let me tell you how I describe the transition from what I did before this job to what I do now because in many ways they're the same thing. People are always saying you were a lawyer and now you're a museum director, how odd. The reconciliation in my view is both personal and professional. Personal, notwithstanding the fact that I was a practicing lawyer for a very long time, mostly in a private firm...both my parents were artists. My father was a painter. You are sitting underneath one of his paintings and beside a couple others that are his. My mother was a musician, virtually a concert-class pianist. So there was this insipient sort of right brain sitting there that was ready to roll in some ways.

There was a critical aspect to the state, not the status—that was already defined—but the state of native communities when I was coming out of law school that did relate to effectuating, if you will, the sovereign and self-governing status that tribes had in many respects and making that understood both as a legal matter and also as a cultural matter. The connection between what I did and what I do now is that the work I did as an attorney was a political, legal, and constitutional matter. But when you get right down to the nub of it, it was in pursuit of maintaining the capacity of native communities to self-determine themselves culturally going into the future. That is what encapsulates what I did as a lawyer in many ways. So that's the strong connection between what I did before and what I do now. I see them as being absolutely synthesized in ways that are very important.

And I would also say, just by example, that tribes now increasingly focus, not only on the protection of their legal prerogatives and rights (which I think they should continue to do), but in tribal communities, in native communities you will find a lot more in the way of human and financial resources that go to what I would call cultural preservation

and cultural continuance. That may have to do with everything from repatriation and acting on the repatriation laws that exist in this country to building local institutions of culture, whether they're called museums or cultural centers . . . tribes are paying far, far more attention to that now. And it's not just for cultural tourism, although it may be and that's fine. It's because it relates just as the work of lawyers did to their perpetuation of themselves. . . .

NR&E: Who they are. . . .

West: Who they are. And what they want to protect.

NR&E: What next? You've announced you're leaving in a year. A university presidency? You've done all this fundraising. . . . I would think that would be a natural.

West: Here's what I would say. I see beauty in the fact that I have no idea what's next, and I'm perfectly comfortable with that resolution. It's not that there are things that don't occur to me. I don't wish to simply lie on a beach somewhere in a tropical climate.

NR&E: Any advice for young Native American attorneys fresh out of law school?

West: Yes. I think that they should take full advantage of the immediate professional training that they have. I think it's a blessing. I think that there are many, many issues that sit in that area which will not be resolved during the lifetime of anybody who is likely to see this interview. They will continue to go on. It's important that good people be devoted to those questions.

The second thing I would say, however, is that one of the beauties of being a Native American attorney is that it prepares you also to go to lots of other places. I think that is what has happened with a number of friends of mine, native and nonnative, who have been attorneys. You'd be shocked at where they end up. And yet they're perfectly capable of being there. It is good training; it encourages skill sets that I think can lead to lots of destinations. Now I think that's a beautiful path.

NR&E: What words can you use to get people who wouldn't normally show up to want to come here?

West: There are two things I would say. The first is that as in any good museum, what we work toward is not only the explication or presentation of histories unique to native people themselves, but a sense of learning from those experiences in a way that's fundamental to how people relate to one another. That can be taken away from this place as a universal message, if you will, that goes beyond the native experience. It has relevance and connection to people in how they see things happening around them. So it's not just about native people in that way. There are lessons of life and culture that have application elsewhere. I think that that is a very important relevance factor.

NR&E: You come out of this building feeling what?

West: Well, I think you come out of this building feeling a certain connectivity to Native American peoples themselves that you might not have had before. But you may have even more general aspirations about the connectivity amongst all people that goes beyond simply the National Museum of the American Indian. I think that is why this place—and this is my second point—is a place of education and enhanced understanding of histories and peoples and the material culture they created. That kind of open-eyed, mutual understanding for me has always been the premise for eventual and true cultural reconciliation amongst peoples.

The United States has a very complicated history. The Americas have a very complicated history. And I'm here to tell you we are not fully reconciled with those histories. And so to the extent that the National Museum of the American Indian, this international center of living cultures, can be a place of greater mutual understanding, it can also become a place both nationally and internationally of cultural reconciliation. God knows you don't have to look very far in the world to see the downside of a lack of cultural reconciliation. It's all around us at this point.

NR&E: So the next Camp David will be down there around the "Potomac circle". . . .

West: (laughs)

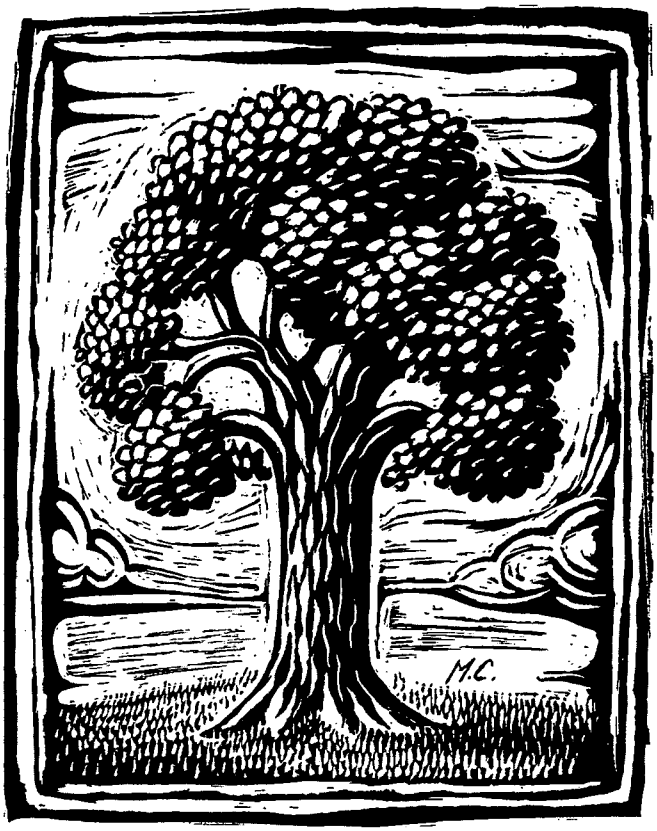
NR&E: What would you have done differently?

West: There is something. I would have made a different kind of effort to introduce people ahead of time to the kind of place this is. The fact that it is a cultural center in profound ways . . . not simply a palace of collections . . . because there are misunderstandings that are fundamental in audiences coming into this place—saying: "This doesn't look like a museum to me" kind of thing . . . that is important. It is important I think to do that because it explains the place so much. In fact, we have a very different reaction from visitors who go through this place on their own and visitors who go through with a cultural interpreter. We don't have enough cultural interpreters to take everybody through accompanied. But the understanding of the place is quite different. I had this very eye-opening experience a couple years ago. I was speaking to a museum program up in the Northeast. A gentleman whom I could tell was just kind of leaning forward the whole time I was talking . . . and I wasn't sure whether he was going to spring to attack or to embrace me. But he came up afterwards and he introduced himself. Then immediately I knew he was a very significant collector, and I knew him by reputation. (I just didn't recognize him out in the audience.) And he said, "You know, I've got to say that when the museum opened and I went down there as the collector I am, I was disappointed, and frankly I didn't like the place. But now that I have listened to you make this presentation, I'm going to actually go back to the museum. And I think I will see it entirely differently."

We're modifying certain aspects of our presentation trying to take this into consideration, and we're going to redo the Potomac. That's in the mill already to make this place from the very beginning more explicable to people who are visiting us, because it is a different place. It's a different place for a reason; it isn't intellectual randomness alive and well on the Mall. There's intentionality to this place, and we want to explain our intentions in ways that make it more understandable.

NR&E: Thank you, Rick.

West: You're very welcome and thank you.



Insights

Edited by David S. May

Puget Sound's Ailing Orcas Receive ESA Protection

Craig T. Donovan

A brisk wind rocks our trimaran in a thousand whitecaps, throwing up a frothy spray over the bow. Suddenly, we hear the *kawoof* of a whale's blow off the stern. The glossy, black upper body and tall, triangular dorsal fin of a male killer whale (*Orcinus orca*) rises out of the water. The whale is a member of one of the resident groups of orcas in Puget Sound. We follow it as it swims to Bellevue Point, an area with abundant kelp beds overlooked by rocky coves and cliffs. The orca slowly approaches the green and brown kelp close to shore. Occasionally, the orca comes to the surface, toying with stalks and fronds of kelp clenched in its teeth or draped around its body. As this scene unfolds, we wonder why this behavior, called kelping, occurs. Is there a vital food source in the kelp such as juvenile salmon on which the whale feeds? Or, is it simply the feel of the kelp that the whale likes against its body? Unfortunately, these and many other questions concerning orca behavior have become more difficult to answer as the number of resident orcas in Puget Sound has significantly declined because of human environmental degradation. On November 18, 2005, the National Marine Fisheries Service (NMFS) issued a final determination to list the Southern Resident orca distinct population segment (DPS) as endangered under the Endangered Species Act (ESA) because the population faced several viable risks placing them "in danger of extinction." 70 Fed. Reg. 69,903–69,910 (Nov. 18, 2005). This final rule became effective on February 16, 2006.

Three forms of orcas inhabit the North Pacific region: residents, transients, and offshores. Resident killer whales include the following groups: Southern, Northern, Southern Alaska, Western Alaska, and Western North Pacific residents. *Id.* at 69,905. The Southern Resident orcas spend several months of the summer and fall inhabiting the inland waters of Washington State and British Columbia. The population is composed of three family groups, identified as J, K, and L pods. These pods are extended families of individuals closely related to each other and can number from two to twenty-five individuals. The population numbers of these orcas have fluctuated over the years. During the 1960s and early 1970s, orcas were removed or killed during capture operations for public display in aquariums, resulting in a shortage of reproductive females. As a result, the population declined by approximately 12 percent in the early 1980s. By the 1990s, the population appeared to rebound to approximately one hundred whales. During 1996 to 2001, the orcas suffered a precipitous decline by 20 percent from ninety-seven to seventy-eight whales, resulting in fewer males

Mr. Donovan is a practicing attorney in New York City and a member of the editorial board of Natural Resources & Environment. *He may be reached at cdonovan@lawsuites.net.*

reaching sexual maturity and females of reproductive age giving birth to calves. In addition, several species of Pacific salmon, the principal food source of the Southern Resident orcas, became severely depleted due to overfishing and loss of habitat. Significant levels of toxins were also found in the orcas' habitat.

In May 2001, the Center for Biological Diversity (Center) and eleven co-petitioners petitioned NMFS to list the Southern Resident orcas as a threatened or endangered DPS under the ESA. 66 Fed. Reg. 42,499 (Aug. 13, 2001). To be considered for listing, a group of organisms must constitute a "species." A "species" includes "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532(16). To qualify as a DPS, a population, or group of populations, must be "discrete." "Discrete" means that the population can be separately distinguished physically, physiologically, ecologically, behaviorally, genetically, or morphologically from other populations of the same species or subspecies. The population must also be "significant" to the species or subspecies to which it belongs. In addition, NMFS must consider the population's conservation status in relation to the Act's standards for listing. 61 Fed. Reg. 4721 (1996). In July 2002, NMFS determined that the Southern Resident orcas' listing was "not warranted" because the population did not meet the significance criterion for consideration as a DPS based on how the scientific community classifies orcas worldwide and that there was insufficient evidence to show that the whales constituted a true orca subspecies. 67 Fed. Reg. 44,133, 44,136–44,138 (July 1, 2002). On December 18, 2002, the Center and several environmental organizations brought suit in the U.S. District Court for the Western District of Washington challenging NMFS's decision. *Center for Biological Diversity v. Lohn*, 296 F. Supp. 1223, 1227 (W.D. Wash. 2003). In December 2003, the district court set aside the "not warranted" finding and remanded for NMFS to reevaluate whether the orcas should be listed under the ESA. The court opined that NMFS erred in evaluating the biological significance of the orcas based on an outdated and discredited global taxon and failed to consider the best available science showing that the orcas did not belong to the same taxon as other orca groups in the northeastern Pacific. *Id.* at 1240–1241. Scientific evidence showed that the orcas possessed a unique social structure, language, rituals, behavior, and knowledge as do other orca groups in the northeastern Pacific and that NMFS failed to consider this evidence for the significance factor of a DPS. *Id.* at 1236–1243. The court ordered NMFS to consider whether the Southern Resident orcas differed markedly from other populations in genetic characteristics, whether listed criteria in the agency's DPS policy for determining significance of DPS were sufficient to evaluate the orcas' significance, and whether the species of orcas to which the Southern Residents belonged was in danger of extinction in a significant portion of its range. *Id.* at 1224, 1242–1243. In 2004, NMFS reconvened its Biological Review Team (BRT) to evaluate new scientific and commercial data in order to update the orcas' status review. The BRT found that the orcas were discrete and significant and should be considered a DPS because the orcas were genetically distinct and exhibited a high degree of reproductive isolation from other resident orcas in the region. In addition, the Southern Resident orcas were significant because the orcas exhibited unique socialization behaviors such as engaging in greeting ceremonies among pods and were not observed visiting rubbing beaches or taking fish from longline fishing gear like other resident orca populations in the region. Moreover, the orcas occupied a distinct ecological setting and possessed a unique knowledge of the timing and location of salmon runs in their range. 69 Fed. Reg. 76,673–76,677 (Dec. 22, 2004). On December 22, 2004, NMFS published a proposed rule to list the orcas as "threatened" and requested public comment. *Id.* at 76,673. In addition, on October 3, 2005, NMFS released a proposed conservation plan for the orcas' recovery. 70 Fed. Reg. 57,565 (Oct. 3, 2005). After reviewing public comments on the proposed listing of the orcas, which compelled NMFS to consider other scientific evidence and give greater weight to threats facing the orcas, a final rule was issued to list the orcas as endangered under the ESA.

The ESA requires evaluation of five factors for species' listing. 16 U.S.C. § 1533(1)(A)-(E). NMFS first evaluated whether the Southern Resident orcas faced present or threatened destruction, modification, or curtailment of their habitat or range. NMFS found that several factors modified the orcas' habitat. Since the early 1990s, the availability of several species of salmon and steelhead upon which the orcas principally feed has declined due to an increase in agricultural, hydropower, urban development, and harvest and hatchery practices in the region. Healthy orca populations depend on adequate sources of prey. NMFS opined that these reductions in prey availability may have forced the orcas to expend more energy while foraging, which, in turn, contributed to declining reproductive rates and higher mortality rates for the whales. In addition, high levels of chemical compounds such as organochlorines like DDT and PCBs and heavy metals released from industry, agriculture, households, and medical treatment have been detected in the orcas' habitat. Many of these compounds are toxic when present in high concentrations and are highly fat soluble, which allows them to accumulate in the fatty tissues of animals. 70 Fed. Reg. at 69,908; NMFS's Proposed Conservation Plan for Southern Resident Killer Whales (Conservation Plan) at 72–78. Through the process of biological magnification, relatively high concentrations of these chemicals accumulate in top-level marine predators, like the orca, which can result in impaired reproduction, skeletal deformities, and suppression of the orcas' immune system. *Id.* Recent studies have documented high levels of these chemicals in the Southern Resident orcas' tissues compared with other resident orca populations in the region. *Id.*

The second factor evaluated was whether the Southern Resident orcas would be exposed to overuse for commercial,

recreational, scientific, or educational purposes. NMFS found that the expansion of commercial shipping, recreational boating, whale watching, and ferry operations in the region may have an adverse effect on the orcas. Because orcas possess a highly developed echolocation system for navigating and locating prey and make a variety of vocalizations to communicate with other orcas, increased levels of sound from boat traffic may temporarily or permanently damage the whales' hearing sensitivity, which in turn affects the whales' foraging ability, navigation, and communication. *Id.* In addition, the increase in boat traffic and noise may be responsible for changes in the orcas' behavior such as the orcas swimming faster, adopting less predictable travel paths, making shorter or longer underwater dives, and moving into open water, as well as calves separating temporarily from their mothers. *Id.* Moreover, increased boat traffic raises the risk of more frequent collisions between the orcas and vessels.

The third factor investigated was whether the orcas would be endangered or threatened by disease. Although disease had not been responsible for the orcas' recent decline, the orcas may be susceptible in the future to infectious diseases that have affected other cetaceans because high contaminant levels in their tissues may be contributing to the suppression of the orcas' immune systems. In addition, the orcas are vulnerable to a serious outbreak of infectious disease because they possess a cohesive social structure, seasonally inhabit a localized area, and have a small population. *Id.* at 69,908; Conservation Plan at 95.

The fourth factor evaluated was whether there were adequate existing regulatory mechanisms to protect the orcas. Current levels of contaminants in the orcas' habitat indicated that existing regulations were not sufficient to protect the whales. Although the United States, Canada, and some other industrial countries have ended most agricultural uses of DDT and stopped the production of PCBs, these chemical compounds continue to be used in Asia and Latin America. In addition, because these chemicals persist in the environment for long periods of time and resist metabolic degradation, these chemicals are transported to the oceans where they continue to enter marine ecosystems. Moreover, new pollutants are emerging that are unregulated and increasingly being linked to adverse effects on the environment. *Id.* at 69,908; Conservation Plan at 72–78. Finally, NMFS evaluated whether any other natural or manmade factors affected the orcas' continued survival. NMFS found that exposure to petroleum hydrocarbons released into the marine environment from an oil spill or other discharge sources presented a potentially serious health threat to the orcas. *Id.* at 69,908; Conservation Plan at 92. Puget Sound is one of the leading petroleum refinery centers in the United States due to its proximity to Alaska's crude oil supply. Fifteen billion gallons of crude oil and refined petroleum products are transported through Puget Sound annually. *Id.* at 69,908. Exposure of the orcas to petroleum products through inhalation of vapors at the water surface and ingestion of hydrocarbons during feeding can cause changes in behavior, reduced activity, inflammation of mucous membranes, lung congestion, pneumonia, liver disorders, and neurological damage, especially if the entire population is in the vicinity of a spill. 70 Fed. Reg. at 69,908.

Although listing provides the Southern Resident orcas with the highest protection under federal law, several additional measures must be instituted to adequately protect them. NMFS has proposed to designate critical habitat in Puget Sound, Haro Strait, and the waters around the San Juan islands for the orcas' recovery and has received public comments on the proposal. 71 Fed. Reg. 34,571 (June 15, 2006). In addition, NMFS is revising its conservation plan in light of the orcas' ESA listing. Final revisions must include conservation measures that continue to rebuild and restore depleted salmon and other prey of the orcas, control pollution and chemical contamination in orca habitat, control disturbance of the orcas from increased boat traffic and other vessels, prevent and control oil spills, monitor and minimize the effect of disease on the orcas, enhance awareness of the orcas and threats to their survival through public information and educational programs, as well as encourage public participation in sighting and tracking orca movements. In light of Congress's recent attempts to roll back ESA critical habitat designation and other protections, if the orcas are to ultimately recover, they will also need advocates from our species in the political arena who will work to help protect the marine environment from pollution and other threats. Let us hope that this will be accomplished so that future generations can experience the beauty and free spirit of the Southern Resident orcas in the wild.

Energy Independence and Global Warming

Richard J. Pierce Jr.

Policy making is often bedeviled by disconnects between public perceptions and reality. This problem is particularly acute today in the context of two public policy issues of central interest to many members of this Section—energy independence and global warming. We need much less public discussion of energy independence and much more public discussion of global warming.

Every president from Richard Nixon through George W. Bush has urged the nation to achieve energy independence. The United States has spent scores of billions of dollars pursuing various versions of "project independence," with no reduction in U.S. dependence on imported oil. U.S. dependence on imported oil has increased steadily through each of the last eight administrations. The pursuit of energy independence is one of the few national goals that attract

Mr. Pierce is the Lyle T. Alverson Professor of Law at George Washington University in Washington, D.C. He may be reached at rpierce@law.gwu.edu.

near unanimous support from politicians of both parties, as well as from virtually all journalists and members of the public. Yet, I know of no expert on energy policy who thinks that pursuit of energy independence makes any more sense than pursuit of automobile independence, tomato independence, or underwear independence.

Last summer, a *Wall Street Journal* reporter asked six energy experts of widely varying political stripes to give their views on energy independence. The views expressed ranged from "crazy" to "rhetorical nonsense" to "bumper sticker" politics. I want to add my voice to that chorus. If we actually were to attain energy independence, it would come at a cost of several trillion dollars per year in reduced Gross Domestic Product (GDP), and we would obtain little or no benefit from such a suicidal effort.

Many people believe that energy independence would have favorable effects on our ability to implement a sound foreign policy and on the likelihood that we will have to use military force. That belief is based on a serious misunderstanding of the relationship between energy and foreign policy. To illustrate the point, consider that we are extremely concerned about Iran today even though we have not imported one drop of oil from Iran in over twenty years. There are links between energy and foreign policy, but they are largely unrelated to U.S. dependence on imported oil. All fuels are traded on global markets. If the global supply of oil declines, the price of oil and other fuels will increase, and the U.S. economy will be adversely affected. That is true, however, whether the reduction in supply has any effect on sources of U.S. oil imports or has effects instead on sources of oil imports to Japan or Europe. It is also true whether the reduction in global oil supply occurs as a result of the latest upheaval in the Middle East, civil disturbances in Nigeria, incompetence in Venezuela, pipeline corrosion in Alaska, or a hurricane in the Gulf of Mexico.

While we need a lot less talk about energy independence, we need a lot more talk about global warming. Specifically, I would like to hear more meaningful discussion about what, if anything, we can, and should, do about global warming. I now rate the probability that the anthropogenic global warming hypothesis is true at around 90 percent—much higher than the probability I would have assigned it at the time of Kyoto. It is time to shift most of the public debate from whether anthropogenic global warming is real to what we should do about global warming.

Let me begin this discussion with a few estimates of the economic effects of global warming by two Yale economists. Robert Mendelsohn estimates that global warming will reduce annual global output by only 0.1 percent, an amount so small that it would justify only modest efforts to address the problem. His colleague, William Nordhaus, estimates that global warming will reduce annual global output by 3 percent, a staggering economic effect that would justify an aggressive and costly response.

When you disaggregate the estimates of Nordhaus and Mendelsohn geographically, you begin to recognize the difficulty of choosing an appropriate response even if you accept Nordhaus's estimate of the devastating effects of global warming on the global economy. Both Mendelsohn and Nordhaus predict that some regions and countries will lose and others will gain as a result of global warming. Thus, for instance, both predict that India and Africa will be major losers, while Russia will gain as a result of global warming.

The details of the determinants of the economic effects of global warming are complicated, but some of the most important determinants are easy to understand. Thus, for instance, India is a very hot, heavily agriculture-dependent country in which the level of agricultural production depends largely on the strength of the annual monsoon. India's economy would be devastated by reductions in agricultural output attributable to temperature increases and changes in the pattern and strength of the annual monsoon. By contrast, Russia is very cold. Its agricultural output would increase significantly as a result of increases in its average temperature. In addition, Russia would save many billions of dollars per year in reduced heating costs, and increased temperatures would provide improved access to the enormous natural gas reserves of Siberia.

Both Mendelsohn and Nordhaus predict only modest changes in U.S. GDP as a result of global warming—Nordhaus predicts a 0.5 percent decline in U.S. GDP, while Mendelsohn predicts a 0.3 percent increase in U.S. GDP. Both also predict large variations in effects within the United States, with some regions and states losing a lot and others actually gaining. Ironically, support for action to address global warming is much stronger in New England than in Oklahoma, even though global warming is likely to have net beneficial effects in New England and terrible effects in Oklahoma.

Estimates of the costs of taking the kinds of actions that would avoid global warming span a range as large as the range of estimates of the cost of global warming. Thus, for instance, Britain's House of Lords estimates that the cost of avoiding global warming would be a reduction of 0.2 percent to 3.2 percent of global output. If you accept the high end of the British estimate of the cost of avoiding global warming and the Mendelsohn estimate of the cost of global warming, it would be economically rational to do nothing and allow global warming to take place. Even if you accept the relatively low Mendelsohn estimate of the economic cost of global warming and the high end of the British estimate of the cost of avoiding global warming, however, you might still support an aggressive and expensive effort to avoid global warming because of some of the noneconomic costs of global warming. Thus, for instance, a recent study by a prestigious team of scientists predicts that global warming will eliminate 30 percent to 60 percent of the species now on the planet, and many studies predict that global warming will displace scores of millions of impoverished residents of the coastal areas of Bangladesh and Indonesia.

Turning from the economics of global warming to the politics of global warming, the picture becomes even more complicated. Many people in the United States who favor

taking some action to address global warming believe that "the answer" is for the United States to participate actively in the Kyoto accord. That belief is mistaken. Even if the United States were to participate in the Kyoto accord, and even if every participant were to fulfill its commitment, the results would be trivial. Action far more drastic than Kyoto is required to avoid global warming.

Most people who want to take the actions required to avoid global warming want to rely on some combination of increased energy efficiency and increased use of renewable resources to get us where we need to be. That strategy would not be effective. In 2005, researchers at Oxford concluded that increased energy efficiency and increased use of renewables cannot alone achieve the necessary reductions. They urged Great Britain and the European Union to adopt other strategies that are more promising, specifically including an all-out effort to maximize the construction of nuclear power plants.

A few months later, researchers at Harvard concluded that, while an all-out nuclear plant construction program would be a step in the right direction and might be sufficient in Europe, it too would not be adequate to the task on a global basis. They concluded that the capacity of the nuclear construction industry is too limited to allow countries like India and China to meet their rapidly increasing demand for electricity with new nuclear power plants alone. The Harvard researchers concluded that only "clean coal" plants can simultaneously satisfy the increased demand for electricity in India and China and allow the world to achieve the needed reduction in emissions. They defined "clean coal" plants as plants that incorporate sequestration of carbon dioxide. We know little about the cost of sequestration yet, but most estimates are that it will add about 50 percent to the cost of generating electricity in a coal-fired plant.

Are the leaders of India and China willing and able to persuade their citizens to pay 50 percent more than the present market price for electricity? I am skeptical. Both countries are now engaged in a concerted effort to try to satisfy their citizens' demands for below-market price electricity by locking up fuel supplies at below-market prices all over the world. I am confident that those misguided efforts will fail, but it is hard to imagine either country making the transition from pursuit of a national strategy of locking in below-market energy prices to a national strategy of paying 50 percent more than the present market price of energy any time in the near future.

So what can, and should, we do about global warming? There is a broad consensus on two issues. First, an effective global warming effort must be global in scope. We may not have to persuade Malawi and Mauritius to participate actively, but no effort can be successful unless it involves the active participation of all major nations, including the United States, China, India, and Russia. Any effort that excludes major nations would be an expensive exercise in futility. It would yield more geographic redistribution of emissions than reduction of emissions.

Second, command-and-control regulation would not be effective for this purpose. An effective command-and-control system would be prohibitively expensive to implement. We must choose instead between a global cap-and-trade system of the type that presently is being pioneered by the Kyoto participants and a globally coordinated carbon tax.

Nordhaus has argued persuasively that a globally coordinated carbon tax is far more promising than a global cap-and-trade system. Nordhaus anticipates several serious problems with any global cap-and-trade program. Such a program would require nations to make coordinated decisions about emissions baselines that would be difficult or impossible to make. It would create so much uncertainty about the future prices of emissions permits that trade in permits would be severely impaired. A global cap-and-trade system would also produce highly volatile energy prices and would be characterized by transaction costs so high that they would impair its efficacy. Finally, Nordhaus fears that a global cap-and-trade system would be impossible to enforce effectively and would be plagued by pervasive corruption.

Nordhaus also points out that a globally coordinated carbon tax has the additional advantage of responding to each nation's fiscal needs. This is a particularly important advantage to the United States. The Federal Reserve Board has identified our present large structural budget deficit as our most serious long-term economic problem. No one knows how much longer we can sustain our present level of deficit spending, but everyone agrees that we must reduce the deficit soon. That can be accomplished only through some combination of increased taxes and reduced spending. A large carbon tax would allow us to get our fiscal house in order without having to make the politically and economically painful decisions to increase income taxes or reduce spending.

By now, you should have some idea of the extreme difficulty of the political task of persuading citizens and politicians all over the world to agree to take the actions needed to respond effectively to global warming. When President Clinton attempted to persuade Congress to enact a Btu tax that would have added only a few pennies to the cost of a gallon of gasoline, his proposal was pronounced dead on arrival on Capitol Hill. It is hard to imagine what it would take to persuade Congress and the public to accept a carbon tax that would have to be at least twenty times the magnitude of the Clinton proposal to be effective. And, a carbon tax is the least expensive means of responding effectively to global warming. A cap-and-trade system would be more expensive, and a command-and-control system would be much more expensive.

Is there any chance of convincing every major nation to bear a share of the massive cost of avoiding global warming? I am not confident that anyone has persuasive powers that effective. Who is going to undertake the task of persuading Russian citizens that they should volunteer to incur large costs to avoid a phenomenon that would benefit most of them?

I do not know what will happen in the global warming debate, but I am confident of two things. First, it is a debate worth having, given the extraordinarily high stakes. Second, many of the members of this Section will spend a high proportion of the rest of their professional lives participating in disputes that are related in some way to the global warming debate.

Household Toxics: The Choice Is (or Should Be) Yours

Christine Y. LeBel

That plug-in air freshener you just installed in your baby's room does not necessarily "freshen" the air; it may instead deaden your (and your baby's) ability to smell by emitting formaldehyde. Sounds a little unhealthy, doesn't it? Well, no one really knows whether your most common household products are unhealthy, or how unhealthy they might be, because there simply is not much research on such subjects. Though certain compounds found in household products (e.g., the constituents of oven cleaners) are regulated as hazardous waste for purposes of disposal, very few regulations pertaining to the manufacture and use of household chemicals exist in the United States despite their prevalence in our daily environment. Evidence tells us that cancer rates and other chronic medical conditions, such as asthma, in the United States have increased since the use of chemicals in the household became widespread in the 1960s and 1970s, but the causative link often is shrouded in a chemical fog.

Who's watching this toxic household? Many consumers think the U.S. Food and Drug Administration (FDA) and Consumer Product Safety Commission (CPSC) exist to address this sort of thing. But household cleaners and convenience items are neither "foods" nor "drugs," and FDA's and CPSC's power to regulate these substances is very limited. Although personal beauty products may be deemed "cosmetics," which are subject to limited regulation regarding ingredients and labeling, the federal government does not regulate most cosmetic ingredients. Thousands of household products are released to the marketplace every year with minimal requirements for safety testing, review, or approval. Manufacturers are not required to make complete disclosures of ingredients or their hazards on their labels. FDA cannot require recalls of these products and CPSC's ability to recall products is limited by their own scarce enforcement resources.

Consumers might then ask, "If household products even potentially pose health risks, particularly to the most vulnerable among us, aren't we, who pay good money for these products, entitled to more information about them?" The European Union (EU) thinks so. In 2003, the EU issued Directive No. 2003/15/EC, which, among other things, phases out the sale of beauty and hygiene products that have been tested on animals; prohibits the use in cosmetic products of substances classified as carcinogenic, mutagenic, or toxic for reproduction; and requires detailed ingredient listings. The stage was set.

In 2005, after much contention, the bellwether state of California became the first in the nation to sign into law a cosmetics regulatory act. On October 7, 2005, California Governor Arnold Schwarzenegger signed S.B. 484, the California Safe Cosmetics Act of 2005. Among other things, the Act requires cosmetics manufacturers to disclose to the state any product ingredient that is on state or federal lists as a potential cause of cancer or birth defects and allows the state Department of Health Services to demand that manufacturers supply health-related information about cosmetic ingredients.

Other states slowly have followed suit and currently have legislation under consideration. In Massachusetts, for example, House and Senate versions of a proposed Act for a Healthy Massachusetts (H.B. 1286, S.B. 553) await further action. The House and Senate bills under consideration set out a process by which the commonwealth's Department of Environmental Protection will identify toxic chemicals currently in use and create action plans for the phaseout of toxic chemicals identified in the Act as "priority" in favor of safer alternatives.

Manufacturers, of course, have concerns about the effect such legislation will have on their businesses. After all, thousands of ingredients are available for use in household products. The imposition of requirements for additional research or labeling for each such ingredient will impose burdensome costs, they argue. Furthermore, they point out, if they are forced to indicate the mere possibility of detrimental health effects related to each ingredient, the negative publicity could cripple their businesses. Manufacturers also strenuously seek to safeguard their trade secrets in a competitive marketplace, trade secrets which they believe are at risk if legislators require manufacturers to divulge the formulations of their products. Finally, they assert, U.S. manufacturers are reputable entities and already engage in voluntary safety research and testing programs through, for example, the Cosmetic Ingredient Review panel (an industry-funded panel that advises the FDA on cosmetics).

Critics counter that voluntary testing simply is not enough when it comes to the environment in our homes and consumer safety. The fox should not be guarding the henhouse, they assert, particularly since the voluntary programs that exist do not evaluate the effects of long-term exposure to, or the synergistic effects of, household toxics.

Ms. LeBel is counsel with the Massachusetts Department of Environmental Protection (DEP) and a member of the editorial board of **Natural Resources & Environment**. *The author thanks Anne Blackman of DEP for her contributions to this article. The views expressed in this article are those of the author alone and should not be attributed to the Massachusetts DEP.* *Ms. LeBel may be reached at cylesq@yahoo.com.*

Companies that are concerned with their bottom line simply do not have appropriate incentives to develop safer alternatives to their products. Furthermore, the manufacture and ultimate disposal of such household items create their own environmentally unfriendly by-products. Someone, critics argue, should be looking out for the consumer, especially the most vulnerable consumers—the young, the ill, and the elderly. This, they note, traditionally is within the purview of government, which should be given the power to better ensure public health and welfare in this realm. Critics of the current situation, therefore, press for safer alternatives and legislation with more teeth, such as an amended Toxic Substances Control Act, 15 U.S.C. § 2601 et seq., better tailored to give the Environmental Protection Agency more information on appropriate exposure levels based on the vulnerability of those likely to be exposed.

But what are "safer" alternatives? The very question reminds us of the fact that publicly accessible information on substances used daily by millions of Americans is lacking. In this debate, it may be helpful to remember that we live in a democracy. Democracies prize the ability of their citizens to make informed choices. We, as citizen consumers, lose that ability without appropriate access to information in the first instance. Additionally, one can argue that the very economics of a truly free market require the dissemination of more, not less, information so that both sides of the equation, supply and demand, can operate most accurately. Legislation, either at the federal or state level, can ensure that we are at least given the power of real choice while we are trying to balance on the supply-demand seesaw. Likely most consumers feel that a business's economic welfare, while important, simply should not be allowed to trump the health of their communities, families, and friends. Once we have the information, the choice really can be, and should be, ours.

Successful Multiparty Settlement of Natural Resource Damage Claims

Suzanne Lacampagne

The specter of Superfund cleanup cost recovery and contribution claims may strike fear in the hearts of potentially responsible parties (PRPs), but the uncertainty and enormity of natural resource damage (NRD) liability can be much more threatening. This article provides insights into a recent NRD settlement process at a Superfund site in Tacoma, Washington, that may be helpful to PRPs going through the same process elsewhere.

Ms. Lacampagne is a partner of Miller Nash LLP in Portland, Oregon, and represented one of the PRPs in the Hylebos NRD settlement. She may be reached at suzanne.lacampagne@millernash.com.

Under both federal and state Superfund laws, the trustees for natural resources, such as the National Oceanic and Atmospheric Administration, the states, and affected Indian tribes, can assert claims for the cost of restoring natural resources at a site where there has been a release of oil or hazardous substances. Restoration costs can include the costs of assessing injuries to natural resources and restoring natural resources to the condition they would have been in without the release. 42 U.S.C. § 9607(a)(4)(C). Trustees have asserted huge NRD claims at numerous sites, particularly at large mining and sediments sites, as well as for large oil spills, such as that from the *Exxon Valdez*. Similarly, in Tacoma, Washington, trustees asserted large claims for NRDs at the Commencement Bay Superfund site, which encompasses several heavily industrial waterways that lead to the bay. One of those waterways is the Hylebos Waterway. One group of PRPs on this waterway pooled their resources to work together and respond effectively to address the claims asserted against them.

For almost one hundred years, businesses including chemical manufacturing, wood products and treatment, and shipbuilding and dismantling operated adjacent to the Hylebos Waterway. Beginning in the early 1990s, the trustees for NRD for the Hylebos began studying the effects of such historical operations on natural resources, and in 2002 and 2003, the trustees sent notices of such claims to PRPs, asking that they make offers to settle their NRD liability. The trustees' proposal was based on a ten-year NRD assessment-substitute that used a habitat equivalency analysis, a tool for determining equivalency between lost and restored natural resources. The trustees stated that they preferred PRPs to undertake NRD projects, rather than pay the trustees cash to do such projects.

To determine liability for the Hylebos Waterway, the trustees used the metric of discounted ecological service acre years (DSAYs), which values losses from contamination and gains from restoration occurring at different times, and discounts them to present value. The trustees determined that the total amount "owed" by the PRPs for the entire waterway was 1,527 DSAYs, and they assigned DSAY liability to sites along the waterway. In their proposal, the trustees informed PRPs that they could either cash out of their DSAY liability at $52,000 per DSAY or propose an NRD project that would provide DSAY value equal to their liability. If all PRPs cashed out, NRD restoration costs would be $79.4 million, creating a big incentive for PRPs to look for NRD projects that they could fund or perform at a lower cost.

After receiving the trustees' proposal, a number of the smaller PRPs formed a mediation and allocation group that sought to resolve their DSAY liability as a group. One of the difficulties of developing a response was that the trustees had allocated liability to individual sites along the waterway, not by PRPs. Many of the sites had several PRPs that had operated on them, and a number of the PRPs had operated on more than one site, making it diffi-

cult to determine how much liability each PRP may have had under the trustees' allocation. With the assistance of an experienced Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) mediator, the group of PRPs did significant work to determine their divisible share of the 1,527 DSAY liability for settlement purposes. They also identified a habitat restoration project with high DSAY value, as requested by the trustees.

The restoration project is the relocation of a levee on the Puyallup River, which is upstream of Commencement Bay. The project will create an estimated 66 acres of salmon spawning habitat, and will create enough environmental benefits, as measured in DSAYs, to cover the 258 DSAY liability that the trustees ultimately attributed to those PRPs. The trustees agreed to settle the NRD claims against the twenty-two PRPs in the group in exchange for the PRP group's agreement to: (1) fund the levee relocation project (which will be performed by Pierce County, Washington, which owns the property); (2) pay $1.794 million for the PRPs' allocable share of the trustees' past damage assessment costs; and (3) pay $150,000 for costs to the trustees of overseeing the project.

While negotiating this settlement took considerable effort on the part of both the trustees and the PRPs, the parties worked diligently and efficiently and came to a settlement in principle relatively quickly, certainly in CERCLA terms. A consent decree was lodged in April 2006, and after receiving no comments on it, the trustees moved to enter the decree in June 2006. *United States v. AOL Express*, Civ. No. C06-5204RJB (W.D. Wash. June 16, 2006).

This successful settlement reflects the efforts of a group of PRPs to resolve their NRD claims through mediation quickly, efficiently, and cost effectively. The ultimate cost to the PRPs of funding the levee relocation project is likely to be considerably below the trustees' cash-out figure of $52,000 per DSAY. It also reflects the efforts of the trustees to enter into good-faith negotiations and respond quickly to a time-sensitive restoration proposal (the PRPs hope to begin funding the project this summer). And of course, the settlement will provide a high-value restoration project that will greatly increase salmon spawning habitat, meeting the goals of the NRD statutes at issue.

Imagining the Unimaginable: Reducing Greenhouse Gas Emissions

David Hodas

"It's the economy, stupid!" Economics is the fundamental motivation for opposition to U.S. participation in the Kyoto Protocol and to adopting mandatory limitations on greenhouse gas emissions. Quite simply, the prospect of the United States reducing its greenhouse gas emissions to 7 percent below its 1990 emission levels has been viewed as just too expensive, with some economists predicting costs of Kyoto compliance to be more than $300 billion. Many Americans do not believe that greenhouse gas reductions can be achieved without, at the least, significant hardship and reduced economic competitiveness with developing nations. To make matters worse, the Kyoto reductions would have only a small impact on the world's global warming trajectory.

The most comprehensive review ever carried out on the economics of climate change, the just-released *Stern Review on the Economics of Climate Change* (*available at* www.sternreview.org.uk) suggests that to stabilize the atmosphere at 550 parts per million CO_2 equivalent would require reducing global emissions to about 25 percent below current levels, and, to allow economic growth, reducing emissions per unit of Gross Domestic Product to 75 percent below current rates. These challenges make Kyoto look like an easy warm-up.

Within the United Sates many perceive these challenges as utterly impossible without destroying our economy. However, the underlying assumption about the cost of reducing greenhouse gas emissions is fundamentally wrong. Most economic models predicting future compliance costs are wrong, and they will always be wrong. The problem with most economic predictions of future compliance costs is that economists do not really trust that this time the market will again innovate and be competitive; the models are flawed because of lack of trust in the marketplace to invent solutions not imagined (because there was no need to imagine) before the mandate was in place.

Until the market is required to innovate to meet a mandate, there is little economic incentive for business to invest in developing or purchasing technology that could meet that mandate. On the other hand, the brilliance of the market, proven time and again, has been that once a mandate is in place, competition to meet that new demand becomes fierce, innovation is rapid, and costs *always* plummet. Removing lead from gasoline, eliminating CFCs to protect stratospheric ozone, reducing sulfur emissions to mitigate acid precipitation, and the near total elimination of organic compounds from the waste streams of our major chemical companies are but a few examples of seemingly unimaginable reductions being achieved, and achieved at remarkably low costs (and sometimes at a net savings to the economy).

Should not predictions be based on the reality of how markets have actually responded, rather than on models that do not trust that markets will respond? If the experience in California is used to measure greenhouse gas emission reductions, then not only is a 30 percent reduction possible, but 45 percent would be relatively easy. Quite simply, if the nation's average per capita greenhouse gas emissions, now 20 tons per person, were at the level of

Mr. Hodas is a professor of law at Widener University School of Law in Wilmington, Delaware, and a member of the editorial board of **Natural Resources & Environment**. *He may be contacted at drhodas@widener.edu.*

California's, 11 tons per person, we would today be emitting about 45 percent fewer greenhouse gases than we are now emitting. California trusts this experience and has now begun to reduce emissions an additional 25 percent below its current levels. *See* California Climate Change Portal, www.climatechange.ca.gov/. And to critics of this idea, who claim that California does not include the greenhouse gases from the electricity it imports from coal-fired power plants in Nevada, Utah, and other states, all I can say is that the claim is untrue. *See* CALIFORNIA ENERGY COMMISSION, INVENTORY OF CALIFORNIA GREENHOUSE GAS EMISSIONS AND SINKS: 1990 TO 2004 (Draft Staff Report) CEC-600-2006-013-D (Oct. 2006).

Look at the numbers, using national and state CO_2 emission data maintained by World Resources Institute in its Climate Analysis Indicator Tool at http://cait.wri.org/. Some states, taken alone, would rank high on the world list of greenhouse gas emissions by country. Texas's total CO_2 emissions would rank it seventh in the world, between Germany and the United Kingdom; California would be twelfth, slightly below Mexico and above France. In fact, the top thirty-three states would rank within the top fifty CO_2 emitters in the world. Even Vermont, the lowest CO_2 -emitting state in the United States, would rank one-hundredth in the world. So, state actions to reduce greenhouse gas emissions can have a measurable impact.

Just as importantly, state per capita emissions are strikingly high compared with the rest of the developed world, let alone the developing nations; U.S. states use fossil fuels far less efficiently than their trading competition. For instance, even the most efficient state in the nation, Vermont (10.6 tons of CO_2/person), would still be ranked in the top twenty-five nations of the world in per capita CO_2 emissions, just slightly better than the Russian Federation. The twenty-five countries in the European Union average 8.7 tons per person, far less than the average of the fifty U.S. states, 20 tons per person. The five most inefficient states, in tons per person, Wyoming (130.4), North Dakota (82.9), Alaska (66.8), West Virginia (57.6), and Louisiana (41.3), would rank in inefficiency one to five in the world, above the world's least efficient nations, Qatar (39.9), Kuwait (24.8), United Arab Emirates (UAE) (24.1), and Bahrain (20.9); the United States is fifth (20.0). Twelve states would fit between Qatar and Kuwait, with another two states just below Kuwait, and four between Bahrain and UAE. Not only does Wyoming top the world's per capita emissions list, its per capita emissions are some 3.25 times greater than those of Qatar, the least efficient nation in the world.

These data suggest that states face enormous opportunities to become more efficient. Remarkably, if the U.S. average emissions per capita were the same as California's, total annual U.S. CO_2 emissions would be reduced by 45 percent, a 2.6 billion ton annual reduction. A resident of Wyoming, North Dakota, Alaska, West Virginia, and Louisiana (379 million tons) emits more than three times the CO_2 than a person in California, a large state with a profound love affair with driving (the California Energy Commission reports that in 2001, more 24.4 million vehicles traveled more than 310 billion vehicle miles in California). At the same time, California's economy grew nicely, from a Gross State Product of $788 billion in 1990 to $1.1 trillion in 2000. *See* California Energy Commission, 2003 Integrated Energy Policy Report (Nov. 12, 2003), www.energy.ca.gov/2003_energypolicy/index.html.

How has California achieved this? By steadily taking small steps over the past twenty years both to improve energy efficiency and to promote renewable energy. Energy efficiency savings have been enormous, with building and appliance standards being the most cost-effective means of achieving significant, durable energy efficiency. As of 2003, California already enjoyed a net savings in electricity and natural gas of more than $36 billion and projected that its efforts would yield a $79 billion net savings to California by 2013. As of 2000, the cumulative effect of its energy efficiency programs and standards was a savings of more than 10,000 MW and 35,000 Gwh of electricity—the equivalent to the output of twenty 500-MW power plants.

The specific details of the programs are too long and diverse to review here, but a few examples might be useful. Variable speed chillers in buildings use 40 percent less electricity than typical chillers; compact florescent bulbs that replace incandescent bulbs provide equivalent lumens using 70 percent less electricity and generate much less heat, thereby reducing air conditioning loads; commercial and residential building codes require new construction to meet high energy-efficiency standards. *See* CEC, INTEGRATED ENERGY POLICY REPORT SUBSIDIARY VOLUME: PUBLIC INTEREST STRATEGIES REPORT, 100-03-012F (Dec. 2003). Continuing along this track will yield even greater reductions, although many challenges remain. If space and time permitted, the same story could be told about New York, whose per capita CO_2 emissions are slightly less than California's.

So, the path toward economically sensible greenhouse gas reductions is visible. Not every state must achieve the lower average as long as the United States as a whole reduces its emissions to 11 tons/person. By setting a national per capita goal, market mechanisms can be adopted to meet the average, further reducing costs. At 11 tons per person, the United States will still be more than 20 percent higher than the European Union average of 8.7. Moreover, the 11-ton-per-person average does not take into account the potential emission-reductions impact of higher gasoline costs and improved motor vehicle mileage standards. The lesson here is that small, steady steps can produce significant results—and those results produce significant net economic benefits. As a nation, we need only follow the lead of California (and New York), who are imagining the unimaginable.

Restoring the Reservation

(Continued from page 23)

stantial community involvement so that the tribal membership and other Reservation residents will have opportunities to help the Tribe move sustainably toward both economic and environmental goals.

Policy alone will not get us where we want to be. Science alone does not accomplish much. Tribes, in implementing their own environmental programs, have the opportunity to learn from other governmental agencies' progress and mistakes while incorporating their unique perspective into the effort to solve the immense problems that our communities and the planet face. Everything is related, and to make any real positive impact in the environment, we must lose the boundaries, find common goals, and work holistically and together. As in Oneida, a critical mass of people at different levels can produce changes in the direction of the decay of the environment.

The EHSD excels by maintaining an innovative professional environmental program based on good science that maintains the integrity of the Oneida traditions and that produces outcomes to sustain the Oneida culture.

There are many more positive indicators than there were a decade ago: more trees, surviving Trout, nesting eagles, and Oneida kids fishing and hunting on the Reservation. The EHSD has heard more comments and gratitude from tribal members and nontribal members about seeing more waterfowl, eagles, turkeys and appreciation for new hunting and gathering sites. As more tribal members use the natural places on the Reservation, we know the efforts at environmental restoration are moving in the right direction. In the end, this is what tribal sovereignty provides—the Tribe helping its people take care of their way of life and sustaining Oneida for the faces yet to come.

Gila River

(Continued from page 27)

request was granted on November 10, 2005. 70 Fed. Reg. 68339. EPA's discussion of its reasons for granting the boundary change considered the arguments made in the Community request but gave particular weight to the ozone concentrations measured by the Community's ambient monitoring network and the fact that those measurements demonstrated that ozone was not a problem on Community land.

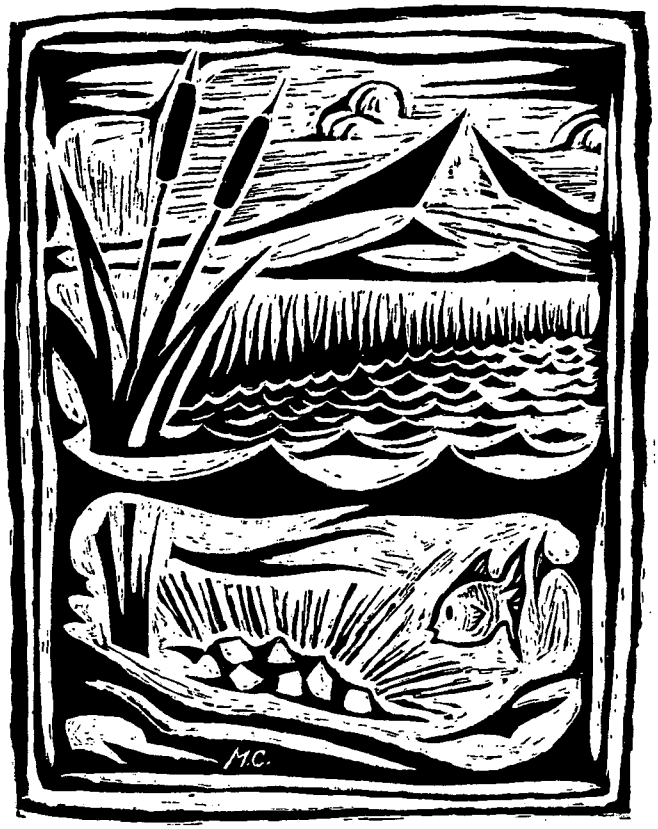
The process for being excluded from the Maricopa County nonattainment areas took over five years. During this time, critical decisions on the TIP were in limbo. By appropriately removing the Community from nonattainment status for both CO and ozone, however, the Community was able to adopt a comprehensive, simpler, and more appropriate TIP than if the status had not changed and the Community was forced to either develop nonattainment area plans that it could not implement or be subject to a Federal Implementation Plan.

Success Through Collaboration and Building Consensus

An important basis for the strength of the GRIC TIP development process is that EPA supported it. Beginning with its adoption of the TAR with its multiplicity of features respecting tribal needs, EPA has provided signficant resources as well as the technical and moral support that made the GRIC TIP possible. Indeed, there could be no TIP without EPA's constructive approach and support of tribal sovereignty. On the Community's part, the DEQ Air Team consciously set out to build a positive relationship with its EPA partners at the regional as well as national level. During the lengthy discussions concerning the designation status (attainment or nonattainment) of the Maricopa County portion of GRIC, the Air Team provided sound scientific data as well as sophisticated policy analysis; the Air Team was persistent and always collaborative. This approach won respect within EPA and produced immensely positive results.

Important policy decisions by the Community are made by consensus after a thorough participatory process in which Community members and affected stakeholders are given numerous opportunities to be briefed and to have their views voiced and considered. Given that the ordinances involve a subject as technically and legally complex as air quality regulations and when the subject of the regulations is entirely new to most Community members, the process needed to be deliberative and thorough.

The collaborative and consensus-based approach of the GRIC TIP development process is a model for other tribes, as well as for EPA and state and local government agencies. With this approach, GRIC was able to advance its core values of long-term protection of air quality and the pursuit of economic development. The GRIC TIP demonstrates how a strong and sustained commitment by both regulatory and elected officials can result in a regulatory development process that builds consensus and is fully transparent. While this process takes time in the development phase, in the case of the GRIC TIP, the resulting public awareness and strong support from stakeholders, including the general public as well as industry, is proving to be worth the time and effort.



Literary Resources

Reviewed by JoAnne L. Dunec

BOOKS

Environmental Law Practice Guide, Indian Country Environmental Law (Chapter 15A)

Dean B. Suagee

Matthew Bender & Co., Inc., 2004

Although we do not usually review a single chapter in the Literary Resources column, given the issue topic, we felt it would be useful to those searching for further resources to highlight Chapter 15A of the *Environmental Law Practice Guide* because of its comprehensive coverage of environmental law as it pertains to "Indian country." As used in the chapter, the term "Indian country" means "all lands within the boundaries of the reservations of federally recognized Indian tribes and other areas that have been formally established for the use of Indian tribes subject to supervision by the federal government."

The chapter emphasizes federal statutory environmental regulatory programs that are administered through "partnerships between the U.S. Environmental Protection Agency (EPA) and the states." According to the author, "[t]his federal-state partnership approach to environmental protection, sometimes called 'environmental federalism,' applies rather differently in Indian country than elsewhere. . . ." These differences can be summarized as follows:

- Indian tribal governments possess sovereign powers that are in many ways comparable to those of the states;
- States generally lack sovereign authority over Indian tribes and tribal members within Indian country and, to the extent that states possess sovereign authority over other persons within Indian country, such sovereignty may be preempted by operation of federal law;
- Some, but not all, of the federal environmental statutes have been amended to authorize EPA to treat tribal governments like states for various purposes, and many tribes have made substantial progress in the development of environmental regulatory programs;
- Tribes face many challenges in the development and implementation of environmental protection programs within the overall framework of federal law, including lack of adequate sources of revenue;
- In carrying out its mission under the federal statutes it administers, in conjunction with the legal doctrine of the federal trust responsibility to Indian tribes, EPA has recognized the need for it to perform a more prominent role in environmental protection in Indian country than it does

where there are state programs performing leading roles; and

- The roles that EPA performs within particular reservations vary depending on a range of factors, including the extent to which tribal governments have assumed leading and supporting roles in various programs.

Other relevant federal statutes are also addressed in the chapter, including the National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA), the Native American Graves Protection and Repatriation Act (NAGPRA), and the Endangered Species Act (ESA).

The chapter is organized in three parts. Part A, "Legal Background," provides historical background, elaborates on the term "Indian country" and other key terms, describes historical eras of federal Indian policy, and provides an overview of federal Indian law. Part A also includes "a general discussion of the approach taken by EPA to the implementation of federal environmental laws in Indian country, [as well as] background discussions of NEPA, NHPA, NAGPRA and ESA."

The second part, Part B, "Programmatic Areas," addresses the implementation of federal statutes administered by EPA, including the Clean Air Act; the Clean Water Act; the Comprehensive Environmental Response, Compensation, and Liability Act; the Resource Conservation and Recovery Act; and the Safe Drinking Water Act. Part B also provides "more detailed discussions of NEPA, NHPA, NAGPRA and ESA as they are implemented in Indian country, and as they sometimes apply in off-reservation contexts in which tribal interests and rights may be at stake."

The chapter concludes with Part C, "Reference Guide," which provides a bibliography of books, monographs, and articles.

Negotiating Tribal Water Rights: Fulfilling Promises in the Arid West

Bonnie G. Colby, John E. Thorson, and Sarah Britton, eds.

The University of Arizona Press, 2005

It's only 50 percent over when the President signs the settlement. Turning paper water into wet water is a difficult task.

— Joe Ely, former chair, Pyramid Lake Paiute Tribe

Nearly 100 years ago, the U.S. Supreme Court recognized federal reserved water rights benefiting tribal lands when it issued its historic decision, *Winters v. United States*, 207 U.S. 564 (1908). As described in *Negotiating Tribal Water Rights*, "the Court held that when the reservations were established, sufficient water to fulfill the purposes of the reservations was implicitly reserved. . . . The Court determined the priority date for these rights to be the date the reservation was established. Assigning a priority date provided a means to integrate federally reserved rights with appropriative water rights recognized under state law."

Western appropriated water law generally follows the concept of "use it or lose it"; however, according to *Negotiating Tribal Water Rights*, "*Winters* rights retain their validity and seniority regardless of whether tribes have put the water to beneficial use." Accordingly, "[b]ecause Indian reservations were generally established before the extensive non-Indian settlement of western lands, *Winters* rights usually have senior priority dates, making them some of the most reliable and valuable rights in many western basins. . . . Today, the process of settling Indian water rights claims entails the tremendous challenge of blending two sets of legal principles: the state doctrine of prior appropriation and the federal reserved water rights doctrine."

In the Foreword, David H. Getches illuminates the complexities:

> Westerners understand, almost intuitively, two realities about water rights: 1) *Scarcity*—All the waters in most western rivers were long ago claimed by early settlers and have been put to use; 2) *Competition*—Everyone with water rights competes with everyone else with rights on the same river system. . . . For all but the holders of the best—that is, the oldest—water rights, nature's uncertainties can cause anxiety and threaten economic losses. . . . Because of the anomaly that imputes to Indian reservations a priority as of the date of their creation, even the most senior claims are often junior to tribal water claims. These old Indian water rights have remained largely unused, however, allowing hundreds or thousands of junior rights to be used for the century or more since the reservations were established. So today, virtually anyone with water rights, whether upstream or downstream, even on the remotest tributary, is potentially in competition with any Indian reservation on the river system.

Given the issues at stake, it is not surprising that as the editors observe, "[e]fforts to clarify and quantify Indian water entitlements often result in protracted, costly litigation." In the Introduction, the editors further note:

> Although litigation can foster animosity among the affected parties, it also can help settlement matters of law and provide impetus for negotiated agreements. In some instances, negotiations have generated creative solutions to seemingly intractable problems, better working relations among the parties, and more integrated management of regional water resources. Many negotiated settlements (hailed as successes when ratified by Congress and the

> tribal, state, and local signatories) later encounter serious implementation difficulties and subsequently flounder. The choice to settle or to litigate is not an either/or decision. Over the past three decades, disputants have relied on a combination of litigation and negotiation to address the complex legal, political, cultural, and economic issues that arise in water conflicts.

Negotiating Tribal Water Rights, the first of two volumes on the subject, presents an organized compendium of knowledge, with contributions by twenty-one authors. As David Getches observed, the "declared purpose of *Negotiating Tribal Water Rights* is to inform and incite dialogue on Indian water rights, leading to their settlement."

Divided into four parts, the book "provides an overview of the many aspects of Indian water rights and the efforts to reach settlements." Part 1 sets the stage by describing the "context in which litigation and settlement negotiations occur and alternative processes for addressing tribal water claims." Part 2, in part through interviews of leaders "on all sides of these issues," provides perspectives on the matters at stake and related issues. Part 3 describes the settlement process and "highlight[s] the most significant features of those negotiated and litigated settlements that have been ratified by Congress and are being implemented, [together with] others that are currently being negotiated." Part 4 "reflects on the collective experience with negotiated settlements and litigation and offers suggestions for more effective resolution of interjurisdictional water conflicts."

An appendix is included that provides a chronological list (with brief comments) of Indian water rights settlements and quantification cases. In addition, an extensive bibliography of legislation, cases, books, periodicals, reports, conference papers and presentations, and theses is included in the book.

Tribal Water Rights: Essays in Contemporary Law, Policy, and Economics

John E. Thorson, Sarah Britton, and Bonnie G. Colby, eds.

The University of Arizona Press, 2006

Whiskey is for drinking; water is for fighting over.

—attributed to Mark Twain

The conflict between American Indians and Europeans is one of history's longest wars. It is the story of a murderous struggle for land and identity. . . The costs of such a prolonged conflict are incalculable, and it is only recently that the leaders of both sides have begun to see the possibilities of a more constructive approach to resolving differences.

—Daniel McCool, Native Waters

Tribal Water Rights: Essays in Contemporaneous Law, Policy, and Economics followed *Negotiating Tribal Water Rights* (reviewed above) to provide in-depth analyses of "the pressing issues that continue to confront successful settlement of tribal claims and effective jurisdictional water management." According to the editors, this second volume "provides more specialized and in-depth treatment of the many complex issues that arise in negotiating and implementing Indian water rights settlements."

As described in the Introduction through arguments made by Karl Dreher, Chair of the Western States Water Council:

> [S]ettlement is generally a sounder approach than litigation for five reasons. First, settling water rights claims is less disruptive to existing uses than litigation is, because many of the uses will be allowed to continue. Second, settlement usually leads to "wet" water rather than just paper water. Third, settlement provides flexibility to find solutions in a variety of ways. Fourth, settlement promotes conservation and wise water management. Fifth, settlement promotes unity and a spirit of cooperation between tribes and states.

Unlike the approach in *Negotiating Tribal Water Rights*, this volume provides substantive essays that address in more detail, among other things, state-federal-tribal relations and jurisdictional issues; tribal jurisdiction over water quality; quantification of tribal water rights and recent case law regarding quantification by the practicably irrigable acreage standard; the particularities of pueblo water rights; the complexities of groundwater in the context of negotiating tribal settlements; the implications of Indian allotment water rights; special considerations with after-acquired trust lands; the effects of the Endangered Species Act on tribal water rights; matters for consideration in successful water settlement negotiations; and challenges with respect to water management.

In their conclusion, the editors make the following observations:

> Over the short term, say the next ten to twenty years, we expect to see continuing (and sometimes problematic) steps to implement existing settlements, as well as continuing efforts to complete settlements for all major western tribes. These latter efforts will be driven by non-Indian needs to secure water supplies for growth as well as economic incentives for tribes. Some of these negotiations . . . are likely to be attenuated, contentious affairs. All the negotiations are likely to involve episodes of litigation and negotiation. The availability of federal money will drive these efforts; but, especially in more populated areas, the increasing value of water will enable local governments to contribute more money to these solutions.

Environmental Justice

(Continued from page 42)

eventually to help bring rain back to the island. *See* Wong, at 10.

The 'Ohana has focused on restoring many important cultural sites, such as the Hale O Papa *heiau*. Between February and October each year, volunteers access the island through the 'Ohana to help in restoration efforts. In November through January, cultural practitioners access the island for the annual *Makahiki*, a traditional Hawaiian celebration of the harvest and time of personal, spiritual, and cultural renewal.

Hawaiians have long recognized Kaho'olawe as a *wahi pana* (a legendary place) and *pu'uhonua* (a place of refuge), and today it is being protected and restored as a result of Native Hawaiian efforts. Native Hawaiians are participating directly in the preservation and protection of Kaho'olawe's archaeological, historical, and environmental resources and are engaged in rehabilitation and rehabitation of the island. As KIRC director Sol Kaho'ohalahala recognized, "Aloha 'Āina [(love for the land)] and the navy's bombing target range on the island of Kaho'olawe were in direct conflict. The movement to stop the bombing of Kaho'olawe was significant and symbolic of the struggle that we faced as a people disenfranchised in their own island home." Sol Kaho'ohalahala, *Reflections of the Past Thirty Years*, KOHEMĀLAMALAMA, Winter 2006.

As these three environmental controversies and successes illustrate, Native Hawaiians are doing justice by reclaiming and restoring Hawaiian land and culture. Although these land reclamations are attempts to preserve Hawai'i's natural environment, they are also hard-fought efforts to restore to Native Hawaiians a measure of self-determination, cultural restoration, and economic self-sufficiency. This expansive view of restorative "environmental justice" goes beyond rectifying the discriminatory siting of toxic facilities. The framework embraces the complexity of the Native Hawaiian experience by integrating cultural values, history, socioeconomic power, and group needs and goals in defining environmental problems and fashioning meaningful remedies.

Environmental Council

(Continued from page 47)

of its land for carbon sequestration purposes with other tribes expected to commit additional lands in the future. Prospectively, NTEC expects to build upon its carbon sequestration activities to further address the adverse impacts faced by tribes as a result of global warming.

The Future of Tribal Air Quality Management

While much has been accomplished by tribes and through the efforts of NTEC, a number of challenges lie ahead, particularly during a time of dwindling federal resources. Tribes must be prepared to focus on filling data gaps through development of comprehensive emissions inventories that include all relevant air pollutants and a national tribal monitoring strategy that ensures tribes have the requisite resources to monitor the myriad of pollutants that threaten their health and welfare. Other challenges include increasing their capacity to better address indoor air quality concerns, a growing concern among native and nonnative populations alike; air toxics and associated mitigation measures; new source review, particularly as EPA moves to finalize a rule that will provide tribes with the ability to regulate minor sources; Class I redesignations of tribal lands (which has been recently stalled for the Forest County Potawatomi Tribe); and global warming that affects tribes nationwide, not just those in northern climates.

With dwindling federal resources, tribes may best be served by partnering with both tribal and nontribal groups. As noted for WRAP, tribes involved with this effort have been the beneficiaries of some tools that they would have unlikely acquired otherwise. Information sharing and protection is one challenge that must be addressed. Some tribes expect that their data will be protected from within and beyond a partnership. According to some tribal leaders and representatives, when a tribe's data have been made publicly available in the past, it has been sometimes used to the detriment of the tribe. Tribes, however, may no longer have a choice to withhold sensitive data if such data are gathered through the use of federal dollars. More federal agencies are expecting to receive such data, which may necessitate tribes to find alternative funding sources in order to keep their data private. Regardless, the data are needed to better serve the tribes and their air quality needs.

Since obtaining the opportunity for delegated regulatory authority to manage CAA programs in 1990, tribes have accomplished a lot in a short time. While many tribes are still conducting preliminary air quality activities, many more are taking on full or partial CAA programs. NTEC has complemented the efforts of tribes by managing and facilitating tribal participation in national and regional efforts while looking for other opportunities to enhance tribal air quality. As tribes move forward, a number of challenges lie ahead, but NTEC expects to provide its ongoing support in meeting such challenges with the intent of protecting and preserving tribal air quality.